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No. _____

In The
Supreme Court of the United States
October Term, 1991

THE CITY OF JAMESTOWN being represented by its
Mayor, STONEY C. DUNCAN, and its Aldermen,
BOB BOW, HAROLD WHITED, CORDIS TAUBERT,
MARK CHOATE and CAIN CHOATE,

Petitioner,
versus

JAMES CABLE PARTNERS, L.P., a Delaware Limited
Partnership d/b/a BIG SOUTH FORK CABLEVISION,

Respondent.

**Petition For Writ Of Certiorari To The
Supreme Court Of Tennessee**

PETITION FOR WRIT OF CERTIORARI

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**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE**

QUESTION PRESENTED

1. Whether the Cable Communications Policy Act of 1984 allows exclusive cable television franchises to continue in existence after the date of the Act's passage, even in communities where the cable television market is not a "natural monopoly," thus perpetuating, as a matter of federal statutory law, a local governmental regulatory scheme that infringes the First Amendment rights of other speakers wishing to enter such market, and contrary to the expressly stated legislative purposes of the Cable Act to promote competition in cable communications, minimize unnecessary regulation, establish franchise procedures encouraging the growth and development of cable systems so as to assure their responsiveness to the needs and interests of local communities, and assure that cable communications provide, and are encouraged to provide, the widest possible diversity of information sources and services to the public.

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Respondent.

**Petition For Writ Of Certiorari To The
Supreme Court Of Tennessee**

PETITION FOR WRIT OF CERTIORARI

The City of Jamestown ("Jamestown," or "the City") respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the Tennessee Court of Appeals, which opinion was effectively adopted by the Supreme Court of Tennessee in its per curiam denial of Petitioners' Application for Permission to Appeal.

OPINIONS BELOW

None of the opinions below have been officially reported. All opinions below are reproduced in full in the Appendix to this Petition, and include an Order of the Supreme Court of Tennessee, an Opinion of the Court of Appeals of Tennessee, Western Section, and an Order of the Chancery Court for Fentress County, Tennessee.

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeals of Tennessee, Western Section, was rendered March 22, 1991, and the Supreme Court of Tennessee, per curiam, denied the City of Jamestown's application for permission to appeal that opinion on June 24, 1991. The City applied, on August 29, 1991, for an extension of time to file this petition until and including October 22, 1991, which application was granted. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Cable Communications Policy Act of 1984 provides in relevant part:

The purposes of this title are to:

- (1) establish a national policy concerning cable communications;
- (2) establish franchise procedures and standards which encourage the growth and

development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;

(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

(5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this title; and

(6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

47 U.S.C. § 521.

(c) Preemption

Except as provided in section 557 of this title, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.

47 U.S.C. § 556(c).

(a) The provisions of:

(1) any franchise in effect on the effective date of this subchapter, including any such provisions which relate to the designation, use, or support for the use of channel capacity for public, educational, or governmental use, and

(2) any law of any State (as defined in section 153(v) of this title) in effect on October 30, 1984, or any regulation promulgated pursuant to such law, which relates to such designation, use or support of such channel capacity,

shall remain in effect, subject to the express provisions of this subchapter, and for not longer than the then current remaining term of the franchise as such franchise existed on such effective date.

(b) For purposes of subsection (a) of this section and other provisions of this subchapter, a franchise shall be considered in effect on the effective date of this subchapter if such franchise was granted on or before such effective date.

47 U.S.C. § 557.

(a) Authority to award franchises; public rights-of-way and easements; equal access to service

(1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction.

47 U.S.C. § 541(a).

The First Amendment to the United States Constitution provides in relevant part:

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

This case also involves a Tennessee state law that authorizes the City's disputed cable television system's franchise, Private Chapter No. 138, Private Acts of 1990. Pursuant to Supreme Court Rule 14(f), the text of this legislative act is set forth in the Appendix to this Petition.

STATEMENT OF THE CASE

On March 14, 1977 the City of Jamestown adopted an ordinance granting a 25-year exclusive franchise to use the streets and rights-of-way of the City for a cable television system. (App. at 3). The franchise was ultimately assigned to James Cable Partners, L.P. ("James Cable"). (*Id.*)

In 1984, Congress passed the Cable Communications Policy Act, codified at 47 U.S.C. § 521, *et seq.* Under the Cable Act and the regulations promulgated by the Federal Communications Commission pursuant thereto, the City's right to regulate James Cable's rates was prohibited. (App. at 18, 4 n.2, *citing*, 47 C.F.R. § 76.5). Pursuant to 47 C.F.R. § 76.5, the Federal Communications Commission has determined that James Cable's system is subject to "effective competition" (from three off-air broadcasters viewable in Jamestown).

Under the original terms of the franchise, the City would regulate James Cable's rates. (App. at 3). However,

after the Cable Act's passage, James Cable and its predecessors sharply raised the rates charged to the residents of the City. In response to demands of City residents, impacted by these rate increases, the City granted itself a cable television franchise on January 8, 1990, and constructed its own cable television system (App. at 3), in order that City residents would have an alternative to James Cable's unregulated rates. After the City's grant of a franchise to itself, but prior to constructing its own cable television system, the Tennessee state legislature passed a private act specifically giving the City the power to own and operate a cable television system. (App. at 20-21).

James Cable then filed a declaratory judgment action in the state chancery court for Fentress County, Tennessee, seeking a declaration of the rights, status, and relation of James Cable and the City in regard to James Cable's cable television franchise. (App. at 3). The City, in its Answer to James Cable's suit, contended that the cable television operator's franchise was no longer exclusive, because its exclusivity provision had been preempted by the passage of the Cable Act. (*Id.*, App. at 18). Additionally, the City contended that the Cable Act's prohibition of the City's preexisting right to regulate the rates charged by James Cable and its predecessors effectively rescinded its franchise contract with James Cable. (*Id.*)

The Chancery Court held that the Cable Act did not amend the cable television franchise that the City had granted to James Cable's predecessors, "because 47 U.S.C. § 557 grandfathered in franchises [existing] on the date of the Act subject to certain limitations. . . ." (App. at 19, bracketed matter supplied). However, the Chancery

Court also found that the effect of the Cable Act "was to preempt the right of the City . . . to regulate rates," and that such right "was the whole consideration for the exclusive provision of the franchise. . . ." (*Id.*) Thus, the Chancery Court held that "the preemption of the right to regulate rates rescinded the exclusive provision of the franchise," and dismissed James Cable's suit. (*Id.*)

James Cable appealed to the Court of Appeals of Tennessee, Western Section, which reversed the trial court and dismissed the cause. (App. at 17). The appellate court held that the trial court improperly had rescinded the franchise contract, the appellate court finding that the contract was not severable, nor was the City's right to regulate James Cable's rates the sole consideration for the franchise contract. (App. at 11-14). The appellate court also held that the Cable Act was not "intended to preempt or prohibit" an exclusive cable television franchise. (App. at 8).

The appellate court also ruled on two claims not explicitly referenced in the trial court's order. First, the appellate court considered the City's claim that since the Cable Act had removed the City's ability to regulate rates, yet (at least according to the trial court's holding) had preserved James Cable's right to operate a cable television franchise free of competition from the City or anyone else, the franchise now constituted a "monopoly" prohibited by the state constitution. The appellate court held that James Cable's freedom from competition under the franchise was not a prohibited monopoly because there had been no "common right" to use the City's streets for cable television purposes prior to the grant of the franchise. (App. at 14). The appellate court also held

that the state private act on which the City relied allowed the City to construct, operate and maintain a cable television system only if there were no existing exclusive franchise. (App. at 14-17).

The City then applied for review to the Supreme Court of Tennessee, which application was denied *per curiam*. (App. at 1). This petition for certiorari review then ensued.

REASONS FOR ALLOWANCE OF THE WRIT

1. THE CABLE COMMUNICATIONS POLICY ACT OF 1984 SHOULD NOT BE CONSTRUED TO ALLOW EXCLUSIVE, NON-RATE REGULATED CABLE TELEVISION FRANCHISES TO CONTINUE IN EXISTENCE AFTER THE DATE OF THE ACT'S PASSAGE, IN COMMUNITIES WHERE THE CABLE TELEVISION MARKET IS NOT A "NATURAL MONOPOLY," SINCE SUCH CONSTRUCTION PERPETUATES A REGULATORY SCHEME THAT INFRINGES THE FIRST AMENDMENT RIGHTS OF OTHER SPEAKERS WISHING TO ENTER SUCH MARKET, AND IS OTHERWISE CONTRARY TO THE EXPRESSLY STATED LEGISLATIVE PURPOSES OF THE CABLE ACT.

The City respectfully submits that the Tennessee Court of Appeals, and the Supreme Court of Tennessee in refusing to review the former court's decision, have decided an important question of federal law, which has not been, but should be, settled by this Court. Due to the proliferation of both private cable television systems and municipal cable television systems that might compete

with existing franchises, special and important reasons exist justifying this Court's granting of a Writ of Certiorari in the instant case.

As of the end of 1978, it was reported that nineteen municipally-owned cable television systems existed across the United States, Richard M. Synchef, *Municipal Ownership of Cable Television Systems*, 12 U.S.F. L. Rev. 205, 235 n. 15 (1978), and it was then hypothesized that most such municipally-owned cable television systems were (and would be) located in rural, geographically inaccessible or difficult terrain areas economically impractical for a commercial concern to "wire." *Id.* at 230. By 1989, however, there were reportedly ten communities that already had privately-owned cable television systems, but which nevertheless were considering building rival municipally-owned systems. Kagan, *Cable TV Franchising* 6 (July 31, 1989). By autumn of the following year that number had increased greater than three-fold, to thirty-six such municipalities, Kagan, *Cable TV Franchising* at Supp. 2-6 (October 31, 1990), and the number now appears to be in excess of eighty-four.

The Eleventh Circuit Court of Appeals recently reaffirmed such municipalities' right to compete with existing private cable television systems, in *Warner Communications, Inc. v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990), cert. denied, ___ U.S. ___ (1991). And within only one year following the Cable Act's passage, scholars noted that "The Act expresses no plain intention to displace competition with regulated monopoly." Gary L. Christensen, *State & Local Regulation* (October 7, 1985), reprinted in, *Cable Television: Retrospective & Prospective* 129, 136 (Practicing Law Institute 1985).

The proliferation of municipalities entering into the cable television industry has been precipitated by private cable operators raising rates across the nation:

The public's consciousness is awakening. Recent rate increases, retiering and channel realignments by cable operators have illustrated that traditional regulatory remedies have been taken away from local officials and no consumer recourse substituted.

* * *

The incredible escalation in cable system prices in recent years can be explained only by the expected monopoly profits. The average per subscriber cost of systems increased five-fold in the last decade.

Nicholas P. Miller, *The Cable Act Revisited: The Public Interest Versus The Cable Monopoly - A White Paper* (July 23, 1987), reprinted in, **Cable Television 1988: Three Years After the Cable Act 41**, 51-60 (Practicing Law Institute 1988). In addition, "The increases in cable rates since 1986 and the inability of municipalities to control such increases under the FCC's effective competition definition have caused concern in Congress." Norman M. Sinel, Patrick J. Grant, & William E. Cook, *Recent Developments in Cable Law 122* (December 24, 1990), reprinted in, **1 Cable Television 1991: Living with Reregulation 15**, 142 (Practising Law Institute 1991).

Despite the nationwide movement of municipalities into the cable television market as a result of private cable television operators (such as James Cable) exercising their right to be free from rate regulation under the Cable Act and regulations promulgated pursuant thereto,

a very basic question posed by the Cable Act remains unresolved, i.e., whether *exclusive* cable television franchises continue to be valid. James Cable claims such exclusivity provisions remain in force under the Cable Act's "grandfather" provision, 47 U.S.C. § 557.

The grandfather provision of the Cable Act, however, specifically states that the provisions of any franchise in effect on the effective date of the Cable Act "shall remain in effect, *subject to the express provisions* of this subchapter. . . ." 47 U.S.C. § 557(a) (emphasis supplied). Such an "express provision" of the Cable Act specifically states that any provision of an existing franchise "which is inconsistent with this chapter *shall* be deemed to be pre-empted and superseded." 47 U.S.C. § 556(c) (emphasis supplied).

Despite the well-established rule that the use of the word "shall" in statutes denotes a mandatory, rather than permissive, meaning, the Tennessee state appellate court, as well as the state supreme court (to the extent it refused to review the lower court's opinion) have both ignored the clear mandate of the Cable Act, since the Act's expressly stated purposes are directly contradictory to the continuance of exclusive, government-granted local monopolies in cable television.

The express provision of the Cable Act which states Congress' purpose in the passage of the legislation is 47 U.S.C. § 521. Included therein is Congress' desire that *competition* in cable communications be promoted, while minimizing "unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521(6).

The City respectfully submits that James Cable's construction of the Cable Act is directly negated by the Act's express provision setting forth the purposes of the Act. Simply put, James Cable "wants its cake and to eat it, too," insisting on its right under the Cable Act to be free from "unnecessary regulation" and "undue economic burden," but at the same time denying the right of the City, or any other cable television system operator, to promote competition by entering the local cable television market.

In the proceedings below, both James Cable and the Tennessee state courts which agreed with it on the point placed much emphasis on the Cable Act's statement that franchising authorities may award "1 or more" cable television franchises for a given area comprising a franchising authority's jurisdiction. 47 U.S.C. § 541(a). The City respectfully asserts that such language is a poor foundation indeed on which to build a monopolistic scheme that, on the one hand, grants franchisees exclusive cable television rights free from competition by other cable operators, yet on the other hand also prohibits local franchisors from regulating the single most salient feature of such systems, and the area most likely to be abused in the absence of such regulation: the rates charged consumers.

The "1 or more" statutory language on which James Cable and the state courts have relied is simply too weak to sustain the state courts' errant construction of the Cable Act, under even the most basic principles of statutory construction.

"One or more" simply states the *number* of franchises which a franchising authority may grant within its jurisdiction. It says nothing regarding whether such franchises may be exclusive or nonexclusive. For example, a franchising authority clearly could grant one single *non-exclusive* cable television franchise under the literal meaning of this provision of the Cable Act.

The general rule of statutory construction requires adherence to the "letter," or literal meaning, of a statute. *Crooks v. Harrelson*, 282 U.S. 55 (1930). Conversely, this Court has long held that any construction which contradicts the letter of a statute should be carefully scrutinized and applied with caution and circumspection. *Id.*; *Priestman v. United States*, 4 U.S. 28, 1 L. Ed. 727 (1800). Departure from the literal meaning of statutory language occasionally may be indicated by certain relevant internal evidence within the statute itself, and where such a construction is *necessary in order to effect the legislative purpose*; but there is *no* concern for such a departure where a literal reading of the statute is *consistent* with its legislative purpose. *Malat v. Riddell*, 383 U.S. 569 (1966).

The state courts below engaged in just such a departure from the literal meaning of the Cable Act by accepting James Cable's position that "1 or more" should be read to mean "one *exclusive* franchise or more *nonexclusive* franchises." Such a construction is directly contradictory to the intent of Congress that the Cable Act promote competition, as specifically set forth in 47 U.S.C. § 521(6).

Furthermore, the construction placed on the Cable Act by the state courts below is also contrary to the *other* specifically stated legislative purposes of the Cable Act.

For example, one such legislative purpose of the Cable Act is to "establish franchise procedures . . . which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2). Yet under the construction given the Cable Act by James Cable, the operation of its continuing exclusive franchise will remain *unresponsive* to such local needs, being regulated neither by the City's former power over rates nor by market conditions which, if competition were present, might encourage such responsiveness.

As was true in other cases, *see, e.g., Warner Cable Communications, Inc. v. City of Niceville, supra*, it was James Cable's unresponsiveness to local needs which precipitated the City's entry into the local cable television market in the first instance. This Court's consideration of the practical adverse effect of James Cable's construction of the Cable Act (i.e., allowing James Cable to remain unresponsive to local needs) is both needed and entirely proper; it is generally regarded as permissible to consider the consequences of a proposed interpretation of a statute which is fairly susceptible of two constructions due to a claimed ambiguity in its terms. *Kreitlin v. Ferger*, 238 U.S. 21 (1915).

The City, however, wishes to make clear that it does *not* concede that there is any ambiguity in the Cable Act with respect to whether the Act was intended to promote competition instead of promoting the exclusivity of cable franchises that might be created or "grandfathered" thereunder. The provisions relied upon by James Cable for its construction of the Cable Act, the "grandfather" provision found in 47 U.S.C. § 557(a), and the "1 or more" phrase in 47 U.S.C. § 541(a)(1), are both general in nature.

Neither of these provisions specifically refer to the exclusivity of cable television franchises, or, conversely, the promotion of competition in the cable television industry.

In contrast, 47 U.S.C. § 521(6) does specifically state that the legislative purpose of Congress in passing the Cable Act was to *promote* competition. The terms of a more specific statute take precedence over those of a more general statute where both speak to the same concern. *Busic v. United States*, 446 U.S. 398 (1980) (regardless of the statutes' temporal sequence). Thus, Section 521(6) takes precedence over Sections 557(a) and 541(a)(1), and the construction placed upon the Cable Act by James Cable and the state courts below is shown to be erroneous.

Finally, the City notes that the pronouncements of this Court and lesser federal courts concerning First Amendment rights of cable television system operators, or those who wish to operate cable television systems in competition with established operators who have been granted exclusive franchises, cast doubt upon the constitutionality of James Cable's construction of the Cable Act (as legitimizing or "grandfathering" previously existing exclusive cable television franchises). This Court has often enunciated the fundamental rule that there is a presumption in favor of the constitutionality of a legislative enactment. E.g., *Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1944); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Becker Steel Co. v. Cummings*, 296 U.S. 74 (1935); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935).

This Court has made it clear that cable television operators have certain First Amendment rights, *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), although the full and final parameters of such rights have yet to be established. However, these rights do not necessarily protect private cable operators such as James Cabil from competition from a municipally-owned system, even if the municipally-owned cable television system might enjoy some advantages which the private franchisee believes will surely result in making its continued operation economically infeasible. *Warner Cable Communications, Inc. v. City of Niceville, supra*.

In the wake of *Preferred Communications, supra*, several lower courts have invalidated exclusive cable television franchises, as contrary to the free exchange of ideas protected by the First Amendment, upon a finding that the local cable television market, in the absence of the exclusive franchise, would not naturally produce a monopoly. See, e.g., *Pacific West Cable Co. v. City of Sacramento*, 672 F. Supp. 1322 (E.D. Cal. 1987); *Century Fed., Inc. v. City of Palo Alto*, 648 F. Supp. 1465 (N.D. Cal. 1986), appeal dismissed, ___ U.S. ___, 108 S. Ct. 1002 (1988); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987); see also, *International Broadcasting Corp. v. City of Bismarck*, 697 F. Supp. 1094 (D.N.D. 1987).

Conversely, if a "natural monopoly" is shown to exist, exclusive franchises can withstand First Amendment scrutiny. See, e.g., *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), cert. denied, 480 U.S. 910 (1987); *Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981),

cert. dismissed, 456 U.S. 1001 (1982); *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982).

The City respectfully asserts that under James Cable's construction of the Cable Act, this important First Amendment dichotomy is necessarily erased. According to the state courts' holdings below, exclusivity provisions of cable television franchises are "grandfathered" under the Cable Act, and valid simply because the Act states that franchising authorities may grant "1 or more" cable television franchises, even though such provision [47 U.S.C. § 541(a)(1)] mentions only the number of franchises that may be awarded, and says nothing of whether the one franchise that may be awarded may be exclusive or nonexclusive. Such an unconstitutional result must be avoided, such that this Court should grant the writ prayed for in this petition. Even if this Court should instead decide that the "natural monopoly" dichotomy referenced above should be discarded in favor of some other rule, the importance of such a clarification in the important First Amendment arena, particularly in light of the overall proliferation of cable television systems and the ever growing number of municipalities considering or already undertaking cable television system ownership and operation, provides an equally compelling circumstance supporting the grant of the writ in the instant case.

Another factor making these First Amendment issues particularly relevant to the City's Cable Act claim is that the purposes behind according such First Amendment protections to "cablespeech" are the same as those specifically enumerated in the Cable Act itself. The Cable Act specifically states that one of its legislative purposes is to assure that cable communications provide, and are

encouraged to provide, "the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521(4). This legislative purpose of the Cable Act coincides with the line of cases beginning with the seminal decision of *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969), and concluding with the Court's recent decision in *Leathers v. Medlock*, ___ U.S. ___, 59 U.S.L.W. 4281 (1991).

In *Red Lion Broadcasting v. FCC*, *supra*, the Court repeatedly stressed that in the application of First Amendment rights in the broadcasting field, it is the right of the public at large to effectively receive a maximum diversity of programming, a right which is "paramount" and "crucial." 395 U.S. at 389-91. The Court emphasized, as well, that there is no First Amendment right on the part of a broadcaster to monopolize a particular reception market. This same approach was reiterated in *CBS v. Democratic National Committee*, 412 U.S. 94, 102 (1973), and *Leathers v. Medlock*, *supra* 59 U.S.L.W. at 4284, quoting, *Cohen v. California*, 403 U.S. 15, 24 (1971). Focusing upon the intent of Congress in enacting statutory regulation of the broadcast industry, this Court has frequently been called upon to review "the long-established regulatory goals of maximization of outlets for local expression and diversification of programming," *FCC v. Midwest Video Corp.*, 440 U.S. 689, 699 (1979), and "the federal objective of ensuring widespread availability of diverse cable services throughout the United States." *Capitol Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 717 (1984). Although the First Amendment value of citizens' access to diversity was not explicitly articulated in the Court's decision in *City of Los Angeles v. Preferred Communications, Inc.*, *supra*, it was clearly embraced within the Court's recognition of the

First Amendment rights of the petitioning cable operator who was seeking to provide a second cable market to a portion of the City of Los Angeles.

The various courts of appeals which have had occasion to review broadcast and cable competition have, drawing upon *Red Lion* and its progeny, refused to apply First Amendment principles in such a manner as to preclude listeners from receiving a diversity of programming. *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985). Because the Cable Act specifically embodies the same goal protected by the First Amendment, see, 47 U.S.C. § 521(4), the construction placed on the Cable Act by James Cable and the courts below, precluding listeners within Jamestown's jurisdiction from receiving a diversity of programming, is clearly incorrect.

In conclusion, the City respectfully submits that the construction of the Cable Act by the Tennessee courts below results in the unjust circumstance that cable television franchisors across the United States can no longer regulate cable operators, rates, but at the same time those cable operators can retain previously established monopolies in the local cable "marketplace of ideas." A statutory construction resulting in injustice must be avoided. See, e.g., *In re Chapman*, 166 U.S. 661 (1897); *American Dredging Co. v. Local 25, Marine Div., Int'l Union of Operating Eng'rs, AFL-CIO*, 338 F.2d 837 (3d Cir. 1964), cert. denied, 380 U.S. 935 (1965). With the nation on the brink of a new century of cable communications, this Court should take the opportunity to "clear the air" regarding the construction

placed upon the Cable Act by the courts below, and grant the petition for writ of certiorari.

CONCLUSION

For all the above reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 21, 1991

APPENDIX



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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JAMES CABLE PARTNERS, L.P.,)	
a Delaware Limited Partnership)	
d/b/a BIG SOUTH FORK)	
CABLEVISION,)	
Plaintiff-Appellee,)) FENTRESS
V.)) CHANCERY
THE CITY OF JAMESTOWN,)) 01-A-01-9008-
being represented by its mayor,)) CH-00296
STONEY C. DUNCAN, and its)	
Aldermen, BOB BOW, HAROLD)	(Filed Jun. 24, 1991)
WHITED, CORDIS TAUBERT,)	
MARK CHOATE and CAIN)	
CHOATE,)	
Defendant-Appellant.)	

ORDER

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE,
WESTERN SECTION AT NASHVILLE

JAMES CABLE PARTNERS, L.P.,)
a Delaware limited partnership)
doing business as BIG SOUTH)
FORK CABLEVISION,)
Plaintiff/Appellee,)
VS.) No. 01-A-01-9008-
THE CITY OF JAMESTOWN,) CH-00296
TENNESSEE, being represented) FENTRESS
by its Mayor, STONEY C.) CHANCERY
DUNCAN, and its Aldermen,) (Filed
BOB BOW, HAROLD WHITED,) Mar. 22, 1991)
CORDIS TAUBERT, MARK)
CHOATE and CAIN CHOATE,)
Defendant/Appellant.)

From the Chancery Court of
Fentress County at Jamestown
Honorable Billy Joe White, Chancellor

Ernest A. Petroff, Huntsville
T. Leslie Dooley, Huntsville
BAKER, WORTHINGTON, CROSSLEY,
STANSBERRY & WOOLF

and

Burt A. Braverman, Washington, D.C.
COLE, RAYWID & BRAVERMAN

Attorneys for the Plaintiff/Appellant James Cable Partners, et al.

R. Bruce Ray, James Town

Attorney for the Defendant/Appellant City of James-town, Tennessee

OPINION FILED:

REVERSED AND DISMISSED

FARMER, J.

TOMLIN, P.J., W.S. : (Concurs)

CRAWFORD, J. : (Concurs)

On March 14, 1977, the defendant, City of James-town, Tennessee, (hereinafter "City") adopted an ordinance which granted Clarence Harding, plaintiff's predecessor in interest:

the exclusive right to erect, maintain, operate and utilize facilities for the operation of communications systems and additions thereto in the streets of the City for a period of 25 years, in accordance with the applicable laws and regulations of the United States of America and the state of Tennessee, and the Charter, regulatory ordinance and regulations of the City.

The exclusive franchise was subsequently assigned to Mountain Cablevision, thereafter to Paradigm Communications, Inc., and ultimately to James Cable Partners, L.P., plaintiff.

On January 8, 1990, the City granted itself a franchise to operate a competing cable television system in James-town. The plaintiff filed a declaratory judgment action seeking a declaration of the rights, status, and relation of the parties hereto in regard to the exclusive franchise agreement. The City in their answer contended that the

franchise was no longer "exclusive" because the exclusivity provision had been preempted by the Cable Communications Policy Act of 1984¹, codified at 47 U.S.C. § 521, *et seq.* The City also argued that the exclusivity provision had been rescinded under the general contract principle of "failure of consideration." The City had reserved the right to regulate rates in this franchise agreement and it is uncontroverted that the Act now disallows and preempts the City's right of rate regulation in this case.² The City contends that this preempted right of

¹ Specifically, the City contended that Sections 621 and 636 of the "Act" preempted exclusive franchises. Section 621(a)(1) provides: "A franchising authority may award . . . 1 or more franchises within its jurisdiction." Cable Communications Policy Act § 621(a)(1), 47 U.S.C. § 541 (1984). Section 636 provides in pertinent part that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded." (Emphasis added) *Id.* at 47 U.S.C. § 556.

² The Act specifically provides that "[a]ny Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided under this section. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section. . . . Within 180 days after the date of the enactment of this title, the [Federal Communications] Commission shall prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition." Cable Act §§ 623(a) and 623(b)(1), 47 U.S.C. at § 543. The F.C.C. (the "Commission") has determined that "effective competition" exists in a community where three television broadcasts are

(Continued on following page)

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regulation was the core consideration for this contract;³ therefore, the exclusive provision fails.

The trial court held that the Act did not preempt or prohibit the grant of an exclusive franchise. In regard to the City's inability to regulate rates under the Act, the trial court found that this was the sole consideration for the exclusive grant of the franchise agreement. Accordingly, the court concluded that the exclusivity provision must fail or be rescinded due to this lack of consideration.

The issues on appeal as set forth in pertinent part by the parties are:

I. Whether the Chancellor erred in determining the Cable Communications Act did not preempt exclusive franchises and whether it was error to admit into evidence expert testimony by the draftsman of the Cable Communications Act, David Klaus, as to its meaning.

II. Whether the Chancellor erred in determining that a failure of consideration had

(Continued from previous page)

viewable through off-air reception. See FCC Cable Television Service, 47 C.F.R. § 76.5 (1990). Pursuant to this definition, James Cable is subject to effective competition.

³ Once an ordinance which grants a franchise is accepted and "all conditions imposed instant to the right performed, it ceases to be a mere license and becomes a valid contract, and constitutes a vested right." 12 McQuillin, *Municipal Corporations* § 34.06 (1986). This contract once established has the same status and effect as any other contract enforceable under the law. 36 Am. Jur. 2d *Franchises* § 6 (1968).

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occurred with regard to the exclusivity provision of the franchise and that, therefore, such provision should be rescinded.

I.

PREEMPTION.

As we have noted, the City contends that the Cable Communications Act of 1984 preempts the grant of exclusive franchises. The "Act" provides in pertinent part that: "A franchising authority may award . . . 1 or more franchises within its jurisdiction." Cable Act § 621(a)(1), 47 U.S.C. at § 541. In addition, the Act provides that any provision of a franchise "which is inconsistent with this Act shall be deemed to be preempted and superseded." *Id.* at 636, 47 U.S.C. at § 556. It is the City's position that since the Act specifically authorizes multiple franchises, then the exclusivity provision is "preempted and superseded." The plaintiff argues, on the other hand, that it was the legislative intent, by expressly providing for "1" or more franchises, to specifically authorize exclusive franchises.

The basic rule of statutory construction is to ascertain the legislative purpose and intent as expressed in statute to be construed. The legislative intent is to be derived primarily from the natural and ordinary meaning of the language contained therein when read in context with the whole statute. The language shall not be given any forced construction that extends or places limitations upon the import of that language. *Metropolitan Government of Nashville and Davidson County v. Motel Systems, Inc.*, 525

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S.W.2d 840 (Tenn. 1975); *Worrall v. Kroger Co.*, 545 S.W.2d 736 (Tenn. 1977).

In order to establish the legislative intent the plaintiff introduced the testimony of David Klaus, formal counsel for the Energy and Commerce Committee of the House of Representatives. Mr. Klaus was responsible for overseeing the drafting of the Act. He testified regarding his understanding of the congressional intent and the purpose of the Act. The City objected to the testimony of Mr. Klaus at the time it was offered contending that it was inadmissible opinion testimony.⁴ We must agree.

It is well-settled principle in this state that while documents and reports evidencing legislative intent and purpose have been freely admitted into evidence when construing statutes, we cannot resort "to the opinions of legislators or others concerned in the enactment of the law, for the purpose of ascertaining the intent of the legislature" even when there is ambiguous language used therein. *Levy v. State Bd. of Examiners, etc.*, 553 S.W.2d 909, 913 (Tenn. 1977), quoting *Bowaters Carolina Corp. v. Smith*, 257 S.C. 563, 186 S.E.2d 761, 764 (1972). Furthermore, when a statute is unambiguous legislative intent can be ascertained from the face of the statute. *Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1 (Tenn. 1986); *Anderson v. Outland*, 210 Tenn. 526, 360 S.W.2d 44 (1962).

⁴ Mr. Klaus specifically testified that the purpose of § 621 [47 U.S.C. 541] of the Act was to allow a franchising authority to employ whatever franchising power it had to grant 1, 2, 3 or more franchises. He stated that the Act was not intended to revise that authority, nor was it intended to interfere with the number of franchises awarded.

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The stated purpose of the Act is:

PURPOSES

Sec. 601. [47 U.S.C 521] The purposes of this title are to -

- (1) establish a national policy concerning cable communications;
- (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;
- (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;
- (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
- (5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this title; and
- (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

Cable Act § 601, 47 U.S.C. at § 521. The City contends that since the Act specifically provides that one of the stated purposes is to "promote competition in cable communications and minimize unnecessary regulation," then it is

clear that an exclusive franchise would be inconsistent with the Act.

We do not agree with the City's contention. In ascertaining the legislative intent the meaning should be derived not from single or special words in a sentence or section but from the statute taken as a whole. *Hall v. State*, 124 Tenn. 235, 137 S.W. 500 (1911); *State ex rel. Thomason v. Temple*, 142 Tenn. 466, 220 S.W. 1084 (1920). Although one of the primary purposes of the Act was to promote competition, it was clearly in the contemplation of the legislature that this would not always be the case. The Act provides or allows for rate regulation in areas or communities where there is no effective competition.⁵ See Cable Act § 623, 47 U.S.C. at § 543. In addition, the Act specifically authorizes one or more franchises. It is hard for us to conceptualize the grant of an exclusive franchise being inconsistent with the import of this language. The Act also contains a provision that clearly enumerates the legislative intention to give existing franchises their full force and effect. Section 637 of the Act provides specifically that

(a) The provisions of-

- (1) any franchise in effect on the effective date of this title, including any such provisions which relate to the designation, use, or support for the use of channel capacity for public, educational, or governmental use, and

⁵ See footnote 2. As we have indicated James Cable is subject to effective competition pursuant to the F.C.C. definition.

(2) any law of any State (as defined in section 3(v) in effect on the date of the enactment of this section, or any regulation promulgated pursuant to such law, which relates to such designation, use or support of such channel capacity.

shall remain in effect, subject to the express provisions of this title, and for not longer than the then current remaining term of the franchise as such franchise existed on such effective date.

(b) For purposes of subsection (a) and other provisions of this title, a franchise shall be considered in effect on the effective date of this title if such franchise was granted on or before such effective date.

Id. at § 637, 47 U.S.C. at § 557.

While we are not holding that this Act legitimizes⁶ an exclusive franchise, we do not feel it was intended to preempt or prohibit such a grant. We feel this is an interpretation which is clearly and unambiguously derived from the language of the statute itself and in conformity therewith. For us to hold otherwise would be to extend or contradict the import of the language contained in this act.

⁶ Although the language of the Act is not inconsistent with an exclusive franchise, we do not feel this Act was intended to override state authority or state law which bars exclusive franchises. See Brenner & Price, *Cable Television and Other Non-broadcast Video Law and Policy* § 3.02(5) (1986).

II.

FAILURE OF CONSIDERATION.

A. Partial Rescission.

As we have noted, the plaintiff's predecessor in interest, Clarence Harding, was granted:

the *exclusive* right to erect, maintain, operate and utilize facilities for the operation of communications systems and additions thereto in the streets of the City for a period of 25 years, in accordance with the applicable laws and regulations of the United States of America and the State of Tennessee, and the Charter, regulatory ordinances and regulations of the City.
(Emphasis added)

In return for this exclusive grant the cable company agreed, among other things, that:

SECTION 10. The charges by the Company shall be fair and reasonable, and exclusive of any tax or taxes which may be assessable against the scheduled installations or services, shall initially be as follows:

Charge for the standard initial attachment shall be a maximum of \$30.00 for the first outlet, and \$5.00 maximum for each additional connection, not exceeding three such additional connections. Charge for monthly transmission service shall be not more than \$10.00 per month for the first television receiving set and \$1.00 per month for each additional television receiving set, not exceeding three such additional television receiving sets. Provided that in installations requiring extension of cable or

facilities in excess of the ordinary and customary requirements, or requiring additional connections in excess of three such additional connections, charges shall be negotiated between the Company and the subscriber.

No changes in the rates or charges shall be made by Company without the approval of City. The City shall be notified at least thirty (30) days prior to any proposed change of rates or charges. An explanation for the reason for making said change shall accompany [sic] such notice or shall be made to the Mayor and Board of Aldermen at the time of notification. The Company shall have the right to make rules and regulations governing its services, not inconsistent with the terms hereof or applicable regulations.

This exclusive franchise was ultimately assigned to the plaintiff which is indicated by an agreement between the plaintiff and defendant. The parties' agreement provides in pertinent part that:

[T]he Franchise was duly issued and is currently in full force and effect according to its terms. There exists no default or violation of the Franchise and no event has occurred that . . . would lead to default. . . .

4. As between the parties, all other provisions, terms and conditions set forth in the Franchise shall and do remain valid and in full force and effect.

5. As a consideration for the approval by the city given to James, James agrees upon the transfer of the Franchise the Franchise Fee shall be increased to five percent (5%) of the gross

revenues per year from all cable services, and James agrees the Franchise Ordinance be amended to provide such Franchise fee.

This agreement was approved by the City on June 13, 1988, well after the enactment of the 1984 Act.

It is uncontested in this case that § 623 of the Act took away the City's right to regulate the rates of the plaintiff's cable communication system. Section 623 provided that a franchise authority could only regulate rates if the cable system in that community was not subject to "effective competition." See Cable Act § 623, 47 U.S.C. at § 543. The Act gave the Federal Communications Commission (hereinafter "FCC") the authority to define or determine what constitutes "effective competition." Pursuant to the FCC definition, the plaintiff is subject to effective competition; therefore, the right to regulate rates as provided for in the parties' contract is preempted by the Act.⁷ The trial court held and the City contends that the ability to regulate rates was the sole consideration for the exclusive grant and, therefore, this provision should be rescinded.

The remedy of rescission is a discretionary matter which should be exercised sparingly and only when the situation demands such. *Early v. Street*, 192 Tenn. 463, 241 S.W.2d 531 (1951); *Robinson v. Brooks*, 577 S.W.2d 207 (Tenn. Ct. App. 1978); *Frierson v. International Agricultural Corp.*, 24 Tenn. App. 616, 148 S.W.2d 27 (1940). Whether

⁷ The Act specifically provides that "any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded." Cable Act § 636(c), 47 U.S.C. at § 556(c).

there has been a failure of consideration is a factual question. 17A C.J.S. *Contracts* § 613 (1963), and we must, therefore, uphold the trial court's explicit finding that there was a failure of consideration unless the evidence in this case preponderates otherwise. *See T.R.A.P.* 13(d).

The Chancellor in the is case only "partially" rescinded the parties' contract. The court specifically found that "the right of the city of Jamestown to regulate rates was the whole consideration for the exclusive provision of the franchise, and therefore, the preemption of the right to regulate rates rescinded the exclusive provision of the franchise. . . ." As a general rule, a contract can only be rescinded *in toto*. A contract can only be partially rescinded where the contract is severable. A contract is severable where each part is so independent of each other as to form a separate contract. The basic premise behind disallowing a party to affirm in part and repudiate in part is that one should not be able to "accept the benefits on the one hand while he shirks its disadvantages on the other." 17A C.J.S. *Contracts* § 416 (1963); *See Baird v. McDaniel Printing Co., Inc.*, 25 Tenn. App. 144, 153 S.W.2d 135 (1941).

Basically a contract is not severable or devisable when its purpose, terms and nature contemplate that its parts and consideration shall be interdependent and common to each other. 17A C.J.S. *Contracts* § 331 (1963). There is no precise definition of when a contract is "entire" or when it is "severable" and each case must ultimately depend on its own facts; however, a whole or entire contract has been referred to as a contract in which the "promises of both parties are interdependent and relate to the same subject matter," *Williams Hardware Co. v.*

Phillips, 109 W.Va. 109, 153 S.E. 147 (1930), or "is one which may not be divided into independent parts." *LeMire v. Haley*, 91 N.H. 357, 19 A.2d 436, 439 (1941). A devisable contract, on the other hand, has been referred to as one in which the performance is "divided into different groups, each set embracing performances which are the agreed exchange for each other," *Pittsburgh Plate Glass Co. v. Jarrett*, 42 F.Supp. 723, 730 (M.D. Ga. 1942), modified on other grounds, *Jarrett v. Pittsburgh Plate Glass Co.*, 131 F.2d 674 (5th Cir. Ga. 1942), or a contract in which the "performance is divided into two or more parts with a definite apportionment of the total consideration to each part." *Integrity Flooring v. Zandon Corp.*, 130 N.J.L. 244, 32 A.2d 507, 509 (N.J. 1943).

In the present case the plaintiff was granted an exclusive franchise in return for which they agreed to numerous conditions. This contract was not one susceptible to division whereby it could be divided into two or more parts. Each part, condition and consideration was in contemplation and accomplishment of the whole, that being to provide a cable service to the Jamestown community. Since each provision was part and parcel of the whole, this cannot be referred to as a devisable contract. Therefore, no one provision can be rescinded without the whole.

The question now becomes whether the City's right to regulate rates is such an integral part of the parties' agreement that the entire contract should be rescinded. The contract may be rescinded if the failure of consideration was such an essential part of the contract that it defeats the very object of the contract or concerns a matter of such grave importance that the contract would

not have been executed had that default been contemplated. *Farrell v. Third National Bank in Nashville*, 20 Tenn. App. 540, 101 S.W.2d 158 (1936); *Lloyd v. Turner*, 602 S.W.2d 503 (Tenn. Ct. App. 1980).

The City in the instant case granted the plaintiff the exclusive right to operate a cable communication system. The consideration for this grant were the conditions upon which the franchise was granted and the benefit the public proposed to derive from the operation of this franchise. 37 C.J.S. *Franchises* § 16 (1975). As conditions of this grant the plaintiff agreed; (1) to charge the regulated rates set by the City; (2) to acquire, maintain, and erect such poles, towers and facilities as are required for the operation of such; (3) to indemnify and hold harmless the City from any claim for injury or damage to property; (4) carry insurance to protect parties against any liabilities that arise; (5) post bond in the amount of \$10,000; (6) maintain the company such that it would not interfere with the off-the-air television signals; (7) relocate poles at its own expense if necessitated by the change of any street grade, allotment or width; (8) commence installation of the system within (1) year; and (9) maintain a local office. The agreement also reserved to the City the right to revoke this franchise if the company failed to comply with the provisions contained therein. In addition, the agreement also contained a severability clause. Further, the agreement wherein City approved the assignment to plaintiff increased the franchise fee to five percent (5%) of gross revenues per year.

This is not a case where we have total failure of consideration. This is a case where one part of the consideration has been preempted by the Cable Communications Act. However, partial failure of consideration is not

grounds for rescission unless the failure defeats the very object or purpose of the contract or renders that object impossible to accomplish. *Farrell*, 101 S.W.2d 158 (Tenn. Ct. App. 1936). The preemption of this provision did not destroy the principal object of this contract. The plaintiff was required to comply with several conditions as consideration for this grant and the public still derives a benefit from its operation. There is no indication that the City's ability to regulate rates was of such grave importance that the franchise would not have been contemplated without the inclusion of such.

B. Monopoly.

The City also contends that without the ability to regulate rates that this "exclusive" grant is essentially a monopoly and in violation of Article I, Section 22 of the Tennessee Constitution which provides: "[M]onopolies are contrary to the genius of a free State, and shall not be allowed." The Tennessee Supreme Court stated in *City of Watauga v. City of Johnson City*, 589 S.W.2d 901 (Tenn. 1979), that a monopoly, as enumerated in the State Constitution, is "an exclusive right granted to a few, which was previously a common right. If there is no common right in existence prior to the granting of the privilege for franchise, the grant is not a monopoly." *Id.* at 904, citing *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 9 L.Ed. 773 (1837); *Leeper v. State*, 103 Tenn. 500, 53 S.W. 962 (1899). The City of Jamestown essentially granted the plaintiff the exclusive right to use its streets in the operation of its communications system for a period of 25 years. It certainly was not a common right to use the streets of the city of Jamestown prior to

this grant; therefore, this grant cannot be classified as a monopoly. *See* 12 McQuillin, Municipal Corporations §§ 34.03 – 34.06 (1986). This opinion is not intended to stand for the proposition that T.C.A. § 7-59-102(a) authorizes the grant of an exclusive franchise because this issue was not raised by the parties, and therefore not addressed by the Court.

C. Impairment of Contract Obligations

The City lastly contends that they are entitled to operate and establish a cable communications pursuant to a private act of the State Legislature, "Private Chapter No. 138" of the Private Acts of 1990. This private act specifically provides:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Article VII of Chapter 54 of the Private Acts of 1959, as amended by Chapter 222 of the Private Acts of 1965, and all other acts amendatory thereto, is amended by adding the following new Section:

Section ____.

(A) The board of mayor and aldermen of the City of Jamestown are authorized to establish and operate a cable television service within the confines of the City of Jamestown, Tennessee, and Fentress County, Tennessee, and to do and perform every act necessary and incidental thereto.

(B) The board of mayor and aldermen of such City of Jamestown are empowered to take and appropriate such lands and

grounds, either within or without the limits of the City of Jamestown, as they may deem advisable, for the location and operation of such cable television service.

(C) The entire work, supervision, and control of the purchase, construction, operation, and maintenance of such cable television service shall be vested in the board of mayor and aldermen of the City of Jamestown. It shall be lawful for such board of mayor and aldermen to employ such subordinate officers, employees, agents, etc., as may be necessary to transact the business and do the work of constructing and operating such cable television service, and to delegate to such subordinate officers, employees, agents, etc., such authority and power as may be consistent with good business management. Such subordinate officers, employees, agents, etc., shall not have the right or authority to make any contracts binding upon such City of Jamestown unless they are expressly authorized to do so by ordinance duly passed by the board of mayor and aldermen of the City of Jamestown. The compensation to be paid to all such subordinate officers, employees, agents, etc., shall be fixed by ordinance which authorizes their appointment, and all such salaries or expenses shall be paid out of the funds or revenues herein provided for.

(D) The board of mayor and aldermen of the City of Jamestown shall have full power and authority by ordinance to make

and enforce all reasonable rules and regulations from time to time for the control and management of such cable television service, and to set rates for the use of the cable television service. The city shall have the right to enter upon the premises where cable television service is used or desired for the purpose of inspecting, repairing, installing, regulating, or terminating the use of such cable television service or otherwise arising out of the operation of such system.

(E) The board of mayor and aldermen of the City of Jamestown shall have full power and authority to borrow money to purchase, acquire, construct, extend, improve, repair or equip any such system and issue its bonds or notes therefor, including refunding bonds, in such form and upon such terms as it may determine. Any such bonds or notes shall be issued pursuant to the procedures set forth in and shall be governed by the provisions of Tennessee Code Annotated, Title 9, Chapter 21, including provisions dealing with covenants permitted in bond resolutions, security and remedies of bondholders and the system hereinabove described shall be deemed to be a "public works project", as that term is defined in Title 9, Chapter 21, Tennessee Code Annotated.

SECTION 2. This act shall have no effect unless it is approved by a two-thirds (2/3) vote of the legislative body of the City of Jamestown. Its approval or nonapproval shall be proclaimed by the presiding officer of the city legislative

body and certified by him to the Secretary of State.

SECTION 3. For the purpose of approving or rejecting the provisions of this act, it shall be effective upon becoming a law, the public welfare requiring it. For all other purposes, it shall become effective upon being approved as provided in Section 2.

The plaintiff contends that if this Act were construed to relieve the defendant of its obligation under the parties' contract, then it would be in violation of Article I, Section 20 of the Tennessee Constitution which provides that "no . . . law impairing the obligations of contracts, shall be made."

While we are aware that a state cannot impair the obligations of a contract unless it is in the bona fide exercise of police power, *Sherwin-Williams Co. v. Morris*, 25 Tenn. App. 272, 156 S.W.2d 350 (1941), we feel, however, that this issue does not need to be resolved. The Private Act by its own terms was not intended to impair or interfere with the City's obligations under the franchise agreement. The Private Act merely granted the City the authority to operate its own cable communications system. There is no indication that this "authority" was intended to override or preempt any existing obligation the City may have incurred. It merely granted or amended the City's charter to allow the City to operate such provided, however, they are not bound by other contractual obligations.

For all the foregoing reasons the judgment of the trial court is reversed and this cause is thereby dismissed. The

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costs of this appeal are taxed to the appellee for which execution may issue if necessary.

/s/ Farmer
FARMER, J.

/s/ Tomlin
TOMLIN, P.J., W.S. (Concurs)

/s/ Crawford
CRAWFORD, J. (Concurs)

IN THE CHANCERY COURT FOR
FENTRESS COUNTY, TENNESSEE AT JAMESTOWN

JAMES CABLE PARTNERS, L.P.,)
a Delaware limited partnership)
doing business as BIG SOUTH)
FORK CABLEVISION,)
Plaintiff,)
VS.) NO. 90-3
THE CITY OF JAMESTOWN,)
TENNESSEE being represented) (Filed
by its Mayor, STONEY C.) May 25, 1990
DUNCAN, and its Aldermen,)
BOB BOW, HAROLD WHITED,)
CORDIS TAUBERT, MARK)
CHOATE and CAIN CHOATE,)
Defendant.)

ORDER

This cause came to be heard before the Honorable Billy Joe White, Chancellor, at the Courthouse in Jamestown the 16th day of May, 1990, on the complaint of the Plaintiff, the answer of the Defendant, the record, the proof both oral and documentary, and the arguments of counsel, from all of which it appears to the Court this suit seeks a declaratory judgment that a cable television franchise agreement from the Defendant City of Jamestown granted in 1977, which was subsequently assigned to the Plaintiff, is exclusive and that a subsequent grant by the City to itself of a franchise to build its own proprietary cable television system is a breach of the exclusive provision of the Plaintiff's franchise.

The Defendant City of Jamestown denied any breach of contract contending the exclusive provision of the 1977 franchise was either preempted by the Federal Cable Communications Policy Act of 1984, codified in 47 U.S.C. § 521, et seq., or, that the exclusive provision of the franchise was rescinded as a result of the Cable Communications Policy Act which effectively took away the right of the City to regulate rates charged by the franchise owner to the cable customers.

On due consideration of the Cable Communications Policy Act, it is the opinion of the Court such Act does not amend the original Jamestown franchise because 47 U.S.C. § 557 grandfathers in franchises on the date of the Act subject to certain limitations, however, the Court finds the effect of the Cable Communications Act was to preempt the right of the City of Jamestown to regulate rates, at least at this time and place. The Court finds the right of the City of Jamestown to regulate rates was the whole consideration for the exclusive provision of the franchise, and therefore, the preemption of the right to regulate rates rescinded the exclusive provision of the franchise, accordingly,

It is hereby ORDERED, ADJUDGED, and DECREED the Complaint of the Plaintiff is not sustained. It is therefore, dismissed at the costs of the Plaintiff.

ENTER this 24 day of May, 1990.

/s/ B J White

BILLY JOE WHITE, CHANCELLOR

APPROVED FOR ENTRY:

/s/ Ernest A. Petroff

Ernest A. Petroff

BAKER, WORTHINGTON, CROSSLEY,

STANSBERRY & WOOLF

Attorney for the Plaintiff

/s/ R. Bruce Ray

R. Bruce Ray

Attorney for the Defendant

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Article VII of Chapter 54 of the Private Acts of 1959, as amended by Chapter 222 of the Private Acts of 1965, and all other acts amendatory thereto, is amended by adding the following new Section:

Section ____.

(A) The board of mayor and aldermen of the City of Jamestown are authorized to establish and operate a cable television service within the confines of the City of Jamestown, Tennessee, and Fentress County, Tennessee, and to do and perform every act necessary and incidental thereto.

(B) The board of mayor and aldermen of such City of Jamestown are empowered to take and appropriate such lands and grounds, either within or without the limits of the City of Jamestown, as they may deem advisable, for the location and operation of such cable television service.

(C) The entire work, supervision, and control of the purchase, construction, operation, and maintenance of such cable television service shall be vested in the board of mayor and aldermen of the City of Jamestown. It shall be lawful for such board of mayor and aldermen to employ such subordinate officers, employees, agents, etc., as may be necessary to transact the business and do the work of constructing and operating such cable television service, and to delegate to such subordinate officers, employees, agents, etc., such authority and power as may be consistent with good business

management. Such subordinate officers, employees, agents, etc., shall not have the right or authority to make any contracts binding upon such City of Jamestown unless they are expressly authorized to do so by ordinance duly passed by the board of mayor and aldermen of the City of Jamestown. The compensation to be paid to all such subordinate officers, employees, agents, etc., shall be fixed by ordinance which authorizes their appointment, and all such salaries or expenses shall be paid out of the funds or revenues herein provided for.

(D) The board of mayor and aldermen of the City of Jamestown shall have full power and authority by ordinance to make and enforce all reasonable rules and regulations from time to time for the control and management of such cable television service, and to set rates for the use of the cable television service. The city shall have the right to enter upon the premises where cable television service is used or desired for the purpose of inspecting, repairing, installing, regulating, or terminating the use of such cable television service. The city shall have the right to terminate such service on the account of the nonpayment of rates. The city shall have the full power and authority to collect and enforce collections of all monies due for the use of such cable television service or otherwise arising out of the operation of such system.

(E) The board of mayor and aldermen of the City of Jamestown shall have full power and authority to borrow money to purchase, acquire, construct, extend, improve, repair or equip any such system and issue its bonds or notes therefor, including refunding bonds, in such form

and upon such terms as it may determine. Any such bonds or notes shall be issued pursuant to the procedures set forth in and shall be governed by the provisions of Tennessee Code Annotated, Title 9, Chapter 21, including provisions dealing with covenants permitted in bond resolutions, security and remedies of bond-holders and the system hereinabove described shall be deemed to be a "public works project", as that term is defined in Title 9, Chapter 21, Tennessee Code Annotated.

SECTION 2. This act shall have no effect unless it is approved by a two-thirds (2/3) vote of the legislative body of the City of Jamestown. Its approval or nonapproval shall be proclaimed by the presiding officer of the city legislative body and certified by him to the Secretary of State.

SECTION 3. For the purpose of approving or rejecting the provisions of this act, it shall be effective upon becoming a law, the public welfare requiring it. For all other purposes, it shall become effective upon being approved as provided in Section 2.



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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE CITY OF JAMESTOWN, being represented by its Mayor, STONEY C. DUNCAN, and its Aldermen, BOB BOW, HAROLD WHITED, CORDIS TAUBERT, MARK CHOATE and CAIN CHOATE,

Petitioner.

v.

JAMES CABLE PARTNERS, L.P., a Delaware Limited Partnership d/b/a BIG SOUTH FORK CABLEVISION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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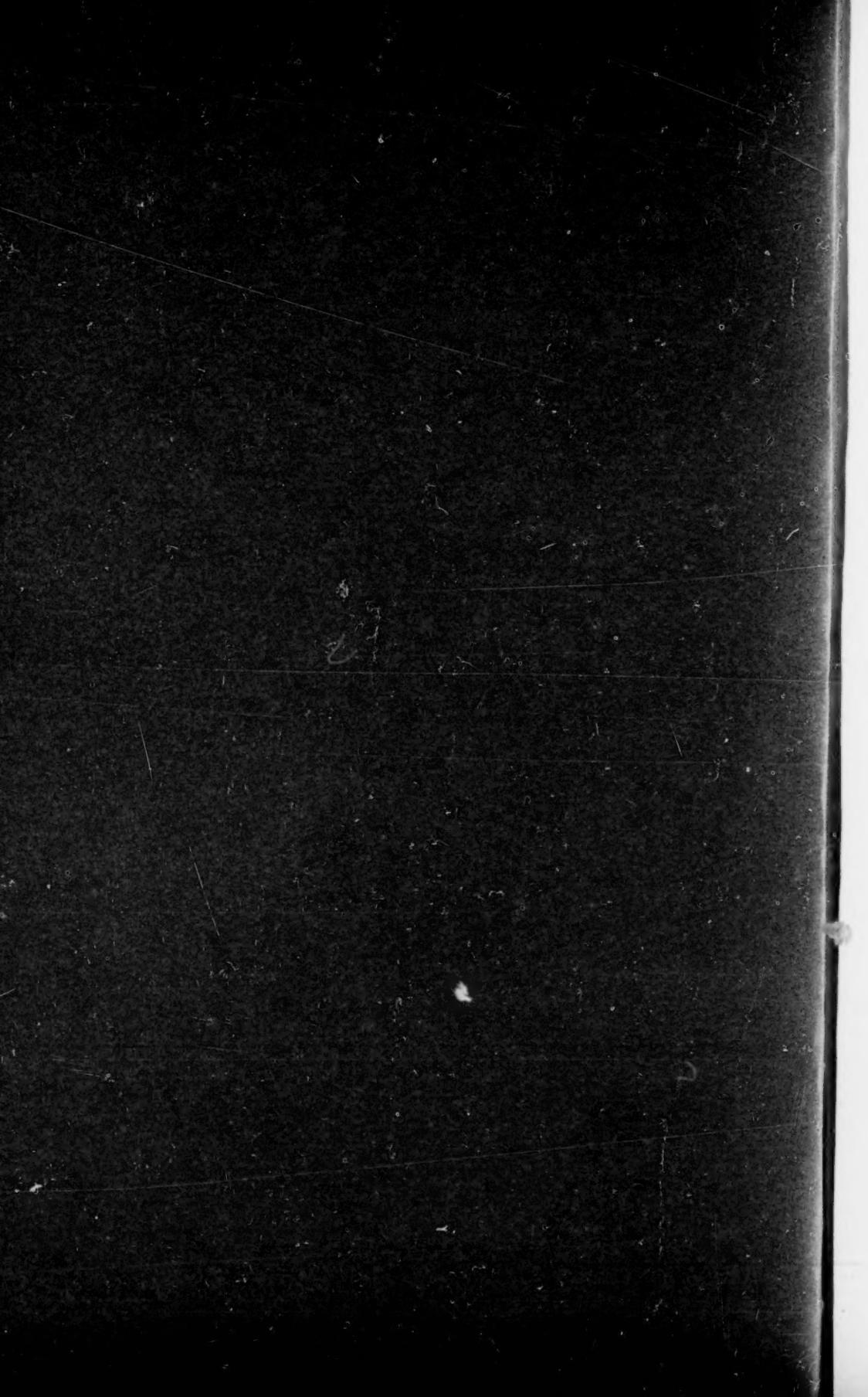


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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

No. 91-683

THE CITY OF JAMESTOWN, being represented by its Mayor, STONEY C. DUNCAN, and its Aldermen, BOB BOW, HAROLD WHITED, CORDIS TAUBERT, MARK CHOATE and CAIN CHOATE,

Petitioner,

v.

JAMES CABLE PARTNERS, L.P., a Delaware Limited Partnership d/b/a BIG SOUTH FORK CABLEVISION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, James Cable Partners, L.P., d/b/a Big South Fork Cablevision, respectfully requests that the Court deny the petition for writ of certiorari, which seeks review of the March 22, 1991 judgment and opinion of the Tennessee Court of Appeals, and the June 24, 1991 *per curiam* order of the Supreme Court of Tennessee denying Petitioner's application for permission to appeal. The decisions and orders of the courts below are not officially reported.

STATEMENT OF THE CASE

James Cable Partners, L.P., doing business as Big South Fork Cablevision ("James"), the plaintiff below, owns and operates a cable television system in Jamestown, Tennessee, pursuant to an exclusive franchise granted by the City

of Jamestown, Tennessee ("the City"), the defendant below. This action was commenced in response to the City's grant to itself of a second franchise and its construction of a second cable television system in derogation of the terms of James' franchise. The action arose as follows.

On March 14, 1977, the City passed Ordinance No. I pursuant to the Cable Television Act of 1977, Tennessee Code Annotated Section 7-59-101, *et seq.*, granting to Clarence Harding, *et al.*, one of James' predecessors in interest,

the *exclusive* right to erect, maintain, operate and utilize facilities for the operation of communications systems and additions thereto, in the streets of the City for a period of 25 years, in accordance with the applicable laws and regulations of the United States of America and the State of Tennessee, and the Charter, regulatory ordinances and regulations of the City.

Ordinance No. I (Tr. Ex.¹ 1), section 1 (emphasis added); see Pet. App. at 11.

In exchange for the grant of the exclusive franchise, the cable company, among other things, agreed to erect such facilities as are required for operation of a cable television system; to relocate such facilities from time to time, at its own expense, as necessitated by local street conditions; to provide cable television services to the citizens of Jamestown; to maintain a local office; to indemnify, protect and save harmless the City from all loss or damage arising out of operation of the cable company and grant of the franchise; to post a bond; and to carry insurance to protect the parties against all claims arising out of the construction and operation of the system. Ordinance No. I, sections 3-9, 13, 14, 17. The franchise agreement further provided for the City's approval of all changes

¹ "Tr. Ex." references are to the parties' trial exhibits. "R." references are to the trial transcript. "Pet. App." references are to the appendix included in the Petition for Writ of Certiorari.

in rates or charges, and gave the City the right to revoke rights granted by the franchise if the company failed to comply with its conditions. *Id.*, sections 10, 11; see Pet. App. at 16. Finally, Ordinance No. I contained the following severability clause:

If *any* section, sentence, clause or phrase of the ordinance is for any reason held illegal, invalid, or unconstitutional, such invalidity shall not affect the validity of the ordinance and any portions in conflict are hereby repealed.

Ordinance No. I, section 20 (emphasis added).

In December 1982, the franchise granted by Ordinance No. I was assigned with the City's approval to Mountain Cablevision, Ltd., d/b/a Fentress County Cable TV, and amended to provide for the payment to the City of a franchise fee in the amount of three percent (3%) of the company's gross annual revenues. Ordinance Granting Amendment To Cable Television Agreement, December 20, 1982 (Tr. Ex. 2), paragraph (B). As expressly stated by the City, "[a]ll other provisions of the original Ordinance . . . shall remain unchanged and in full force and effect." *Id.*, paragraph (J). The franchise was next transferred in December 1984 to Paradigm Communications, Inc., James' immediate predecessor in interest. Again, the City consented to assignment of the entire franchise. Consent To Assignment, December 10, 1984 (Tr. Ex. 3), sections 2, 3.

In June 1988, the franchise was assigned by Paradigm to James. Written consent and approval of the City to the transfer were reflected in a Memorandum of Agreement, in which the City twice confirmed that all provisions of the original franchise remained valid and "in full force and effect." Memorandum of Agreement, June 13, 1988 (Tr. Ex. 5), sections 3 and 4; see Pet. App. at 12. In consideration of the City's consent to the assignment, James agreed to a two percent (2%) increase in the franchise fee to be paid to the City, raising the fee to five percent (5%) of the cable company's gross annual revenues. Memorandum of Agreement, section 5; see Pet. App. at 12-13.

In January 1990, the City, for the first time, took the position that James' franchise was no longer exclusive in nature, and granted itself a franchise to operate a cable television system in Jamestown. Ordinance of the City of Jamestown, January 8, 1990 (Tr. Ex. 7). The City thereafter built and began operating its system. Such actions were taken in direct contravention of James' exclusive right to operate a cable television system in Jamestown during the term of Ordinance No. I. Significantly, prior to granting itself a franchise, the City never gave any indication to James that it did not consider James' franchise to be exclusive (R. 67-76), and indeed never raised the issue of exclusivity when it approved assignment of the franchise to James or in its negotiations with James. Tr. Exs. 10-12; R. 73, 85.

It was undisputed below that an exclusive franchise existed at least until 1984, when the Cable Communications Policy Act of 1984 (the "Cable Act"), 47 U.S.C. § 521, *et seq.*, was passed by Congress. Defendant's Answer to Complaint, paragraph 3. It was further undisputed that the franchise continued thereafter to fully exist to the extent it was not preempted by the Cable Act. *Id.* However, the City argued that James lost its exclusive franchise with the Act's passage in 1984 because the Act, in providing that cities could not regulate basic cable television rates in certain circumstances, took from the City the essence of its bargain and entitled the City to abrogate the exclusivity provision of Ordinance No. I.²

² Congress' partial preemption of local regulation of rates for basic cable television service was not without warning to municipalities such as the City of Jamestown. Prior to the City's award of Ordinance No. I in 1977, the Federal Communications Commission ("FCC") had already preempted local rate regulation of "premium" cable television services, *see In the Matter of Clarification of the Cable Television Rules*, 46 F.C.C.2d 175, 199-200 (1974); *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765, 767 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979), and announced that it was reexamining the extent to which cities would be permitted to regulate rates for basic cable services, *see In the Matter of Inquiry into the Manner in Which Cable Television Regular Sub-*

In advancing this argument, the City relied primarily upon the following two sections of the Cable Act: Section 621(a)(1), 47 U.S.C. § 541(a)(1) (Supp. 1990), which provides that “[a] franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction;” and Section 623, 47 U.S.C. § 543 (Supp. 1990), which provides in pertinent part:

- (a) . . . Any franchising authority may regulate the rates or the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.
- (b)(l) . . . [T]he [Federal Communications] Commission shall prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition.

* * *

- (2) For purposes of rate regulation under this subsection, such regulations shall—
 - (A) define the circumstances in which a cable system is not subject to effective competition; and
 - (B) establish standards for such rate regulation.
- (3) The Commission shall periodically review such regulations, taking into account developments and technology, and may amend such regulations,

scriber Rates are Established, 58 F.C.C.2d 915, 916 (1976); *In the Matter of Amendment of Subpart C of Part 76 of the Commission's Rules and Regulations Regarding the Regulation of Cable Television System Regular Subscriber Rates*, 60 F.C.C.2d 672, 683 (1976). Thus, in entering into the franchise agreement in 1977, and in approving its assignment on three occasions thereafter, the City knew or reasonably should have known that Congress or the FCC could, at any time, change the circumstances under which basic rates could be regulated or do away with rate regulation altogether.

consistent with paragraphs (l) and (2), to the extent the Commission determines necessary.

The definition of "effective competition" and the standards for rate regulation are determined by rules issued by the Federal Communications Commission ("FCC"). At the time of the proceedings below, the FCC had determined that effective competition was present where three television broadcast signals were viewable in a community through off-the-air reception. *See* 47 C.F.R. § 76.33 (1990). Because at least three signals were viewable in Jamestown, the effective competition regulations had the effect of suspending regulation by the City of rates for basic cable service. However, the Cable Act provided that the effective competition standard was to be subject to periodic review and revision by the FCC. *See* 47 U.S.C. § 543(b)(3) (Supp. 1990).

In response to the City's grant to itself of a franchise, James commenced a declaratory judgment action in the Chancery Court for Fentress County, Tennessee, seeking a declaration of the parties' rights under Ordinance No. I. The trial court held that Section 621 of the Cable Act, 47 U.S.C. § 541 (Supp. 1990), did not prohibit exclusive franchises or preempt exclusive franchises that preexisted the Act's passage; therefore, any exclusive right to own and operate a cable system granted before enactment of the Cable Act remained valid under Section 621 after passage of the Act. Pet. App. at 24. However, the trial court held that, with the enactment of Section 623, 47 U.S.C. § 543 (Supp. 1990), which took away the City's ability to regulate rates for basic cable services, a failure of consideration as to the exclusivity provision of the franchise occurred. Finding that the City's ability to regulate cable rates was the sole consideration for the City's grant of an exclusive franchise in 1977, and that under the Act the City presently did not have the ability to regulate rates, the court ruled that the exclusivity provision of the franchise should be rescinded. Pet. App. at 24.

On cross appeals, the court of appeals reversed. First, the court looked at the Cable Act as a whole and determined that the grant of an exclusive franchise was not inconsistent with, or preempted by, the terms of the Act. Pet. App. at 6-10. Noting that "the Act specifically authorizes one *or* more franchises," the court of appeals stated: "It is hard for us to conceptualize the grant of an exclusive franchise being *inconsistent* with the import of this language." Pet. App. at 9. Considering Section 637 of the Act, the court of appeals further observed: "The Act also contains a provision that clearly enumerates the legislative intention to give existing franchises their full force and effect," including exclusive franchises. Pet. App. at 9. The court of appeals concluded that "to hold otherwise would be to extend or contradict the import of the language contained in this Act." Pet. App. at 10.

Second, the court of appeals ruled that the City's present inability to regulate cable television rates did not, under Tennessee law, result in a failure of consideration sufficient to rescind James' exclusive franchise. Applying the rule that a contract *could* be rescinded for a failure of consideration *only* if the consideration was such an essential part of the contract that its failure would defeat the very object of the contract or concerned a matter of such grave importance that the contract would not have been executed had that default been contemplated, the court of appeals observed that the franchise imposed on James no fewer than nine continuing obligations (Pet. App. at 16; see discussion at pp. 2-3, *supra*), and that there was "no indication that the City's ability to regulate rates was of such grave importance that the franchise would not have been contemplated without the inclusion of such." Pet. App. at 17.³ The court concluded that rescission was

³ Had the City felt that the power to regulate rates during the entire term of the franchise was an essential predicate to its grant of an exclusive right to operate a cable system, it could have provided in the franchise for termination of the exclusive right in the event that its ability to regulate rates ceased. In fact, the City did expressly provide for termination of the franchise under certain conditions (see Ordinance

not warranted because there had not been a total failure of consideration and because the temporary preemption of local regulation of basic cable rates,⁴ which was only one part of the consideration for the parties' contract, had not defeated the principal object or purpose of the agreement, the provision of cable television service by James. Pet. App. at 15-17.⁵

The City then filed an application with the Supreme Court of Tennessee for permission to appeal from the court of appeals' decision. The City's application was denied by *per curiam* order dated June 24, 1991. See Pet. App. at 1.

REASONS FOR DENYING THE PETITION

In 1977, the City of Jamestown issued a franchise to James' predecessor, authorizing it to construct and operate a cable television system. In return for the cable operator's promise to spend substantial sums of money to build the system, to provide service to the community and to be subject to a variety of municipal regulations, James' predecessor was given the *exclusive* right to use the City's streets for purposes of operating a cable system. James' purchase of the system for \$1,400,000 and its improvement of the system for an additional \$850,000 were based significantly, as were its predecessors' actions, on the City's

No. I, sections 3, 11, 13), but it did not include the cessation of rate regulation among those conditions. Moreover, the severability clause (Ordinance No. I, section 20) manifested the parties' intent that the agreement would remain otherwise fully effective even if the rate regulation provision were to become unenforceable.

⁴ See Pet. App. at 4 n.2, 9 n.5 and 13 n.7, and accompanying text.

⁵ The court of appeals also rejected the City's claims that James' exclusive franchise constituted an illegal monopoly under Tennessee law (Pet. App. at 17-18), and that the City was authorized to operate a cable system in defiance of Ordinance No. I pursuant to a private act of the state legislature, Private Chapter No. 138 of the Private Acts of 1990 (Pet. App. at 18-22). The validity of these holdings, as well as the court of appeals' conclusion that there had not been a partial rescission of the franchise, are purely state law issues that are not reviewable by this Court. See *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933); *Kingsley International Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 688 (1959).

contractual assurance that the system would retain the exclusive right to provide cable television service to the community and thereby to recoup its investment.⁵ R. 78. That assurance was repeated in writing by the City on no fewer than three occasions over a period of eleven years, including the assignment of the franchise to James in 1988, at which time the City ratified the terms of the original exclusive franchise and confirmed that it continued to be "in full force and effect." Tr. Exs. 3, 5, 6.

In 1990, perhaps seeing cable television as a means of supplementing declining municipal revenues or augmenting local political power,⁶ the City issued itself a franchise and entered into the cable television business, reneging on the deal that it had struck with James and James' predecessors. The City defended its breach of James' franchise contract by conjuring up an argument that federal preemption had resulted in partial rescission of the contract, a claim never so much as mentioned by the City in the five years that the Cable Act had then been in effect or in the one and one-half years since the City had ratified James' franchise in its entirety.

The Tennessee Court of Appeals saw the true colors of the City's conduct, holding that the Cable Act did not preempt exclusive franchises, and that Congress' partial deregulation of cable television rates by local governments such as the City of Jamestown had not resulted in a partial rescission of James' franchise.⁷ In the final result, the

⁵ The City provides no record citation for, and the record does not support, its claims that James Cable and its predecessors "sharply raised the rates" after the Cable Act's passage (Pet. at 6), that James was "unresponsive" to local needs (Pet. at 14), or that there was any interest of city residents in, let alone "demands" for, a municipal cable system (Pet. at 6).

⁶ The court of appeals' opinion is in accord with the decisions of other courts that have held, where local rate regulation provisions in franchises have been found to be unenforceable due to enactment of the Cable Act, that such provisions are fully severable from all other parts of the franchise and that all remaining contractual rights and obligations continue in full force and effect. See, e.g., *Cox Cable San Diego, Inc.*

court of appeals treated this as a matter of contract; the City had entered into an agreement, which it was required to honor. The Supreme Court of Tennessee thereafter denied the City's application for review.

The court of appeals' decision was not only correct, it was prescient. On October 25, 1991, amendments to the FCC's regulations came into effect under which, as pertinent here, effective competition is not deemed to exist in a community, and the cable system's basic service rates are not free from local regulation, unless there are at least six television broadcast signals viewable in the community through off-the-air reception. See 47 C.F.R. § 76.33 (1991), as amended by *In the Matter of Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 F.C.C. Rcd. 4545 (1991). Because there are fewer than six signals viewable in Jamestown, the result of this revision is that the City's power to regulate James' basic cable rates, which was temporarily suspended in 1984, has been restored. Thus, the cornerstone of the City's claim that the consideration for James' exclusive franchise had failed and that the City must be allowed to compete in order to provide "an alternative to James Cable's *unregulated rates*" (Pet. at 6) (emphasis added) has crumbled.

Notwithstanding the restoration of its power to regulate James' basic cable rates, the City continues in its quest to evade its contractual obligations and to abrogate James' exclusive franchise. Renewing its federal preemption argument, and invoking for the first time a First Amendment claim never uttered below, the City would have this Court believe that the Court of Appeals' decision wrongly decides a question of federal law that is of widespread importance and that implicates constitutional freedoms. It does none of these.

As we explain below, (1) the petition fails to satisfy the requirements of 28 U.S.C. § 1257(a), which governs the

v. *City of San Diego*, 188 Cal. App. 3d 952, 233 Cal. Rptr. 735, 743 (1987).

certiorari jurisdiction of this Court; (2) the court of appeals correctly construed the Cable Act in holding that Congress' partial preemption of local rate regulation did not result in rescission of the exclusivity provision of James' franchise; and (3) review of the decision below is unwarranted, given the virtually unique factual circumstances underlying this case and the resulting limited precedential or practical importance of the issues presented. Accordingly, the petition for writ of certiorari should be denied, and the City should finally be made to abide by its contractual undertakings.

I. THE COURT LACKS JURISDICTION OVER THIS ACTION

Under 28 U.S.C. § 1257(a), there are only three bases upon which this Court may exercise certiorari jurisdiction to review the final judgment of a state court: (1) "where the validity of a treaty or statute of the United States is drawn in question;" (2) "where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States;" or (3) "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. § 1257(a) (Supp. 1991).

The City has failed to demonstrate in its Petition, and cannot show, the existence of any of these exclusive bases for the exercise of certiorari jurisdiction in this case.

A. The Judgment Below Does Not Draw In Question The Validity Of A Statute Or Treaty Of The United States

The judgment of the court below does not draw in question the validity of a statute or treaty of the United States. This prong of Section 1257(a) is not implicated unless the power of Congress to enact the statute or treaty in question has been directly inquired into by the state court. *Baltimore & Potomac R. Co. v. Hopkins*, 130 U.S. 210, 224 (1889) ("Whenever the power to enact a statute . . .

is fairly open to denial . . . , the validity of such statute is drawn in question, but not otherwise.") It is not sufficient for purposes of this prong of Section 1257(a) that the state court merely construed the federal statute so as to deny a claim thereunder, or that it viewed the facts so as to place the litigant outside the scope of federal law. *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 289-90 (1958) (mere "construction" of federal statute, as opposed to "holding of unconstitutionality," provides no basis for invoking this prong of the jurisdictional statute.)

In this case, the Tennessee Court of Appeals did not question Congress' power or authority to enact the Cable Act, but rather simply found that the Cable Act "clearly and unambiguously" was not intended "to preempt or prohibit" exclusive franchises of the type granted by the City to James. See Pet. App. at 6. Thus, the judgment of the court below does not "draw in question" the "validity" of the Cable Act, and therefore jurisdiction to review that ruling cannot be predicated on this prong of 28 U.S.C. § 1257(a).

B. The Judgment Below Does Not Draw In Question The Validity Of A State Statute As Being Repug- nant To Federal Law

Section 1257(a) also provides for review of the final judgment of a state court "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . or laws of the United States." 28 U.S.C. § 1257(a) (Supp. 1991). The City cannot invoke this prong of Section 1257(a) because Ordinance No. I is not a "statute of any State" within the meaning of Section 1257(a).

Although the phrase "a statute of any State," as used in Section 1257(a), has been construed to include a municipal ordinance,⁸ an ordinance will be deemed to be a

⁸ See, e.g., *Coates v. Cincinnati*, 402 U.S. 611, 612 (1971) (entertaining First Amendment challenge to municipal ordinance regulating assemblages of persons on sidewalks).

state "statute" for purposes of Section 1257(a) only if it is a "legislative"—as opposed to contractual—action. *See Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 42 (1983);⁹ *Lathrop v. Donohue*, 367 U.S. 820, 824-27 (1961). An ordinance may be considered a "legislative action" if it exhibits the characteristics of legislation—i.e., if it is a "unilateral promulgation of a rule with continuing legal effect." *Perry Education Association*, 460 U.S. at 42 (emphasis added).

In contrast, where a municipality has entered into an agreement with a private party that is, in its essential characteristics, a bilateral contract between the parties, such an agreement cannot subsequently be characterized as a "State statute" for the purpose of invoking the jurisdiction of this Court.

[A] [contractual] agreement [between a governmental body and a private party] is not unilaterally adopted by a lawmaking body; it emerges from negotiation and requires the approval of both parties to the agreement. Not every government action which has the effect of law is legislative action . . . [S]tatutes authorizing appeals are to be strictly construed, *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n. 1 (1970). . . .

Perry Education Association, 460 U.S. at 42-43.

Here, the franchise on which the City casts its jurisdictional focus is in essence a bilateral contract between the City and James Cable,¹⁰ negotiated by the parties and supported by the exchange of mutual promises and con-

⁹ In *Perry Education Association*, the Court analyzed this issue in the closely related context of whether a collective bargaining contract entered into by the government constituted a "State statute" for purposes of invoking the Court's jurisdiction under the version of 28 U.S.C § 1254 then in effect. The Court found that it did not. 460 U.S. at 42-43.

¹⁰ See, e.g., *Texarkana v. Arkansas Louisiana Gas Co.*, 306 U.S. 188, 199-200 (1939) (utility franchise is a contract); see also McQuillin, Municipal Corporations, § 34.06 at n.1 (3rd ed. 1986).

sideration. The franchise bears none of the trappings of a "legislative action" of general applicability, and undeniably is not a "unilateral promulgation" of a rule of general applicability. *Id.*¹¹ Consequently, Ordinance No. I does not constitute "a statute of any State" for purposes of, and the Court does not have jurisdiction to review this case under, this prong of Section 1257(a).

C. There Is No Constitutional Title, Right, Privilege Or Immunity At Issue Here On Which Jurisdiction Can Be Founded

In its Petition, the City seeks for the first time to place a First Amendment gloss on this contract dispute. The effort must fail for two reasons.

First, as explained at greater length below, the City has no substantive First Amendment claim on which certiorari jurisdiction can be founded. See pp. 26-28, *infra*. It would strain constitutional logic if the City, having issued this exclusive franchise, were now permitted to assert a deprivation of First Amendment rights against itself as both victim and state actor. In addition, to the extent that, *arguendo*, the City may be deemed to be a potential First Amendment speaker, it contractually forsook such rights when it voluntarily entered into an exclusive franchise with James and its predecessors. Moreover, having agreed upon an exclusive franchise and induced James and its predecessors to rely on that agreement, the City is estopped from now repudiating the bargain on the ground that it could perhaps suffer from an asserted constitutional infirmity.

¹¹ This fundamental distinction between "enforcement of a limited contractual provision" in a franchise agreement and a comprehensive legislative or regulatory scheme of general applicability has been held to be "dispositive" of the issue of jurisdiction based on a claim of federal preemption in other federal question jurisdiction contexts. See *Nashoba Communications Limited Partnership v. Town of Danvers*, 893 F.2d 435, 440-41 (1st Cir. 1990) (noting that franchise agreement is "not regulation" but rather merely "a contractual commitment" stemming from the language of the agreement).

Second, even if the City did have a substantive First Amendment claim to assert, it clearly has waived any such claim by failing to timely and properly raise the issue in the Tennessee courts. "The Court has consistently refused to decide federal constitutional questions raised here for the first time on review of state court decisions." *Webb v. Webb*, 451 U.S. 493, 499 (1981), quoting *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).¹² Indeed, this Court ordinarily will not review *any* question not raised below, even those arising from the federal courts where considerations of federal-state comity are not implicated. *Youakim v. Miller*, 425 U.S. 231 (1976); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957). "It is generally only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Youakim v. Miller*, 425 U.S. at 234, quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927); see, e.g., *Pollard v. United States*, 352 U.S. 354 (1957) (permitting criminal defendant who had not had lawyer below to raise federal question before the Supreme Court).

Here, the City failed to raise, or indeed even utter any mention of, its First Amendment claim in the courts below. It therefore must be deemed to have waived the issue. In light of the City's inability to satisfy this or the other prongs of 28 U.S.C. § 1257, James submits that the Court is without jurisdiction to review this case.

¹² This principle is well-settled and is codified in Supreme Court Rule 14(h):

If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

II. THE LOWER COURT CORRECTLY HELD THAT THE CABLE ACT DOES NOT PREEMPT EXCLUSIVE FRANCHISES

The City asserts that the Tennessee Court of Appeals erred in holding that exclusive franchises were not preempted by the Cable Act. Determination of this issue turns on the interpretation of Sections 621, 636 and 637 of the Cable Act, 47 U.S.C. §§ 541, 556 and 557 (Supp. 1990). These provisions, together with the Act's legislative history and subsequent judicial and administrative opinions, confirm that the Cable Act preserved rather than preempted preexisting exclusive cable television franchises.

Section 621(a)(1) provides that

[a] franchising authority may award, in accordance with the provisions of this title, *1 or more* franchises within its jurisdiction.

47 U.S.C. § 541(a)(1) (Supp. 1990) (emphasis added). Significantly, this section of the Act invests franchising authorities with discretion to determine whether they will grant multiple franchises or a single franchise and, if a single franchise, whether it will be exclusive.

Section 636(c) provides:

Except as provided in Section 637, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded.

47 U.S.C. § 556(c) (Supp. 1990) (emphasis added). Under this section, it is only those provisions of franchises awarded *after* the effective date of the Cable Act that, if "inconsistent with [the] Act shall be deemed to be preempted and superseded." *Id.* Provisions of franchises

that are consistent with the Act are not preempted, and provisions of preexisting franchises that are inconsistent with the Act are saved by Section 636's reference to the "grandfather" provision of Section 637.

In that regard, Section 637 provides, as pertinent here:

The provisions of . . . *any franchise in effect on the effective date of this title . . . shall remain in effect*, subject to the express provisions of this title, and for not longer than the then current remaining term of the franchise as such franchise existed on such effective date.

47 U.S.C. § 557(a) (Supp. 1990) (emphasis added). Under Section 637, provisions of *pre-Act* franchises that are inconsistent with the Cable Act are grandfathered for the remaining term of the franchise.

Thus, grant of an exclusive franchise was, and is, entirely consistent with the "1 or more" language of Section 621 and, therefore, is not preempted under Section 636. Moreover, to the extent that, *arguendo*, the exclusivity provision of Ordinance No. I were deemed to be inconsistent with Section 621, it would be grandfathered under Section 637 for the remainder of the franchise term.

The legislative history confirms that Sections 621, 636 and 637 of the Act were not intended to curtail municipalities' existing, or pre-existing, powers to grant a single, exclusive franchise. As stated in the authoritative House Report,¹³ Section 621 "grants to the franchising authority the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area." H.R. Rep. No. 934, 98th Cong., 2d Sess. ("H.R. Rep. No. 934") 59 (1984), reprinted in 1984 U.S. C.C.A.N. 4655, 4696. The Federal Communications Commission has similarly construed Section 621 as "not re-

¹³ The House Report is the official legislative history of the Cable Act, having been adopted by both Chambers. See 130 Cong. Rec. S14,285 (daily ed., Oct. 11, 1984); 130 Cong. Rec. H12,235 (daily ed., Oct. 11, 1984).

quir[ing] the franchising authority to grant more than one franchise to service the same community." *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to Provision of Cable Television Service*, 5 F.C.C. Rcd. 362, 366 (1989).

Decisions of a number of courts since the Cable Act's passage are consistent with the construction of the Act allowing for the grant of a single cable television franchise. See, e.g., *Communications Systems, Inc. v. City of Danville, Kentucky*, 880 F.2d 887 (6th Cir. 1989); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 717 (6th Cir. 1986), cert. denied, 480 U.S. 910 (1987); *Nor-West Cable Communications v. City of St. Paul*, 3-83 CV 1228 (D. Minn., Sept. 1, 1988), denying J.N.O.V. (Feb. 27, 1989); *City Communications, Inc. v. City of Detroit*, 685 F. Supp. 160 (E.D. Mich. 1988) (all cases sustaining cities' grant of single franchise or denial of application for second franchise). See also Brenner and Price, *CABLE TELEVISION AND OTHER NON-BROADCAST VIDEO LAW AND POLICY*, § 3.02[5] at 3-23 (1986) ("Section 621(a)(1) . . . seemingly legitim[izes] the grant of an exclusive franchise . . .")

This Court has also apparently recognized that the Cable Act was not intended to divest local governments of their power, in appropriate circumstances, to limit the number of cable television franchises to be granted in a community. In *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), the Court noted that the California Code authorized municipalities "to limit the number of cable television operators in an area by means of a 'franchise or license' system," and that "Congress ha[d] recently endorsed such franchise systems" in enacting the Cable Communications Policy Act of 1984. *Id.* at 490 n.1.

The City suggests that this construction of the Cable Act contradicts Congress' expressly stated purpose to promote competition in cable communications. Pet. at 11-15; see 47 U.S.C. § 521(6) (Supp. 1990). Yet, it is inconsistent with neither the express language nor the purpose of the

Act. Although it was a general objective of the Act to promote competition, Congress chose not to disrupt the *status quo* or to divest local communities of their discretion regarding how best to serve local needs and interests. The Act reflects the recognition that there had been and would continue to be instances in which cities would decide for sound reasons that only one operator could, or should, be permitted to use a community's streets to provide cable television service. Congress sought to preserve prior decisions to that effect through the grandfather provision of Section 637, and to ensure through Sections 621 and 636 that cities would continue to have the freedom to decide in the future to award either several franchises, only one franchise, or one exclusive franchise, as the public interest might require. This interpretation reads the several provisions of the Act in harmony by preserving local discretion in individual markets while fostering competition on a national scale.¹⁴

Federal preemption of a state law may be found to have occurred only in limited circumstances. This Court has described them as follows:

first, when Congress, in enacting a federal statute, has expressed a *clear* intent to pre-empt state law . . .; second, when it is *clear*, despite the absence of explicit preemptive language, that Congress had intended, by legislating *comprehensively*, to *occupy an entire field of regulation* and

¹⁴ Other provisions of the Act foster competition and diversity in cable communications. *See, e.g.*, 47 U.S.C. § 532 (Supp. 1990) (requiring cable operators to "designate channel capacity for commercial use by persons unaffiliated with the operator. . ."); 47 U.S.C. § 553 (Supp. 1990) (imposing limitations on ownership of cable facilities and/or provision of cable programming by persons owning other television, telephone or common carrier facilities). Similarly, the FCC has taken additional steps to promote competition both within the cable industry and between cable and other developing technologies. *See, e.g.*, *In the Matter of Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming*, 5 F.C.C. Rcd. 523 (1989) (addressing competition between cable operators and home satellite dish distributors).

has thereby "left no room for the States to supplement" federal law . . .; and, finally, when compliance with both state and federal law is *impossible* . . ., or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . ."

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984) (citations omitted) (emphasis added).

Here, there is no "clear mandate" (Pet. at 11) in the Cable Act to extinguish all preexisting exclusive franchises. To accomplish so disruptive an objective—one that would abrogate valuable, bargained-for contract rights—Congress would have had to express a clear intent to do so. Yet, if anything is clear from the explicit language of the Act, its legislative history and its interpretation by the courts and the FCC, it is that Congress did not intend to second-guess, and disrupt, the countless franchise decisions that local governments had made prior to passage of the Cable Act.¹⁵ The lower court correctly concluded that the Act did not preempt or supersede preexisting exclusive franchises such as Ordinance No. I.

III. THE PETITION FAILS TO DEMONSTRATE FACTORS WARRANTING THE COURT'S DISCRETIONARY REVIEW OF THIS CASE

Rule 10.1 of the Rules of this Court provides: "A review on writ of certiorari is not a matter of right, but of judicial

¹⁵ In arguing that the Cable Act "should not be construed to allow exclusive, non-rate regulated cable television franchises to continue in existence after the date of the Act's passage, in communities where the cable television market is not a 'natural monopoly'" (Pet. at 8), the City is asking this Court to do what Congress chose not to, i.e., to adopt a standard different from that which Congress intended to, and did in fact, adopt. If, *arguendo*, rate increases "'caused concerns in Congress'" (Pet. at 10), or if Congress' preemption of rate regulation has produced an unintended result in those few communities that had previously awarded exclusive franchises, then that is a legislative matter for Congress, not this Court, to address.

discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore." Rule 10.1 further states that, while not controlling, the Court will not exercise its discretion to review the decision of a state court on certiorari unless

a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals [. . .] has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rule 10.1(b), (c).

The City contends that this case presents "an important question of federal law, which has not been, but should be, settled by this Court." Pet. at 8. That assertion is based on a gross overstatement of the breadth and importance of the issues of this case, and a misstatement of the suitability of the case for review under the criteria often enumerated by this Court.

A. The Issues Presented By This Case Are Narrow And Of Limited Importance

The City seeks to create the impression that municipal overbuilds of privately owned cable systems are becoming a common phenomenon and that this case therefore raises issues of broad significance. Both the premise and the conclusion are mistaken.

As its premise, the City states that there has been a proliferation of private and municipal cable television systems that "might" compete with existing franchises (Pet. at 8), and that a number of communities are "considering" municipal "overbuilds," i.e., the construction of municipally owned cable systems to compete with existing operators (Pet. at 9). In fact, even if a number of communities have *considered* operating cable systems, few have actually awarded franchises for the construction of municipal sys-

tems, even fewer of those communities have actually built such systems, and the majority of municipal systems built to date have been in communities unserved by another cable operator.

Thus, while the City notes that in July 1989 "there were reportedly ten communities that . . . were considering building rival municipally-owned systems" (Pet. at 9), it fails to note that in October 1990 only two of the ten had actually commenced an overbuild.¹⁶ Similarly, out of the 36 municipalities reported in October 1990 as falling within the loosely defined category of "pending overbuilds," only three had actually moved forward in March 1991.¹⁷ Moreover, out of 62 municipally owned systems nationwide reported to be operating in March 1991, only six were overbuilds of private cable operators.¹⁸ The growth in municipal overbuilds, therefore, could more accurately be described as a trickle rather than a flood.

As to the City's conclusion, even if there were a flood of municipal overbuilds, and even if the Court felt that municipal overbuilds presented issues warranting consideration,¹⁹ this case is not a suitable vehicle for such con-

¹⁶ Kagan, Cable TV Franchising, Supp. at 2-6 (October 31, 1990) ("Kagan, October 1990").

¹⁷ *Id.*; Kagan, Cable TV Franchising, Supp. at 1-2 (March 25, 1991) ("Kagan, March 1991"). "Pending overbuilds" are defined as including instances where there has been "a second franchise award or inquiry, application pending, city feasibility study, etc." Kagan, October 1990. There are many reasons why a city might make such an inquiry or feasibility study without any intent of actually constructing or operating a municipal system, one of which is merely to put pressure on an incumbent operator to accept changes in an existing franchise.

¹⁸ Kagan, March 1991. The remaining 56 municipal systems were in communities not served by another cable operator.

¹⁹ It apparently does not. This Court recently has denied certiorari in two other cases involving the right of a municipality to operate a competitive cable television system, both of which presented issues of substantially broader applicability and significance than the instant case. In *Warner Communications, Inc. v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990), cert. denied, ____ U.S. ___, 111 S.Ct. 2839 (1991).

sideration. The issues here, as the Tennessee Court of Appeals recognized, are shaped by the exclusivity clause of James' franchise. In contrast, none of the municipal overbuilds to which the City refers involved the overbuild of a private operator who had been granted an *exclusive* franchise. Instead, each involved an incumbent who operated under a *non-exclusive* franchise, so that the municipality was free to proceed with its competitive system, unrestrained by any exclusivity provision. Because the facts of this case are far narrower than, and different from, cases involving non-exclusive franchises, the preemption question raised by the City here has absolutely no relevance to those situations.²⁰ Moreover, because of the virtually unique factual basis of the ruling below, it poses little threat of interference with the administration, or accomplishment of the statutory aims, of the Cable Act. *Compare, e.g., United States v. Ruzicka*, 329 U.S. 287 (1946) (certiorari granted in case raising "questions of importance in the administration of the Agricultural Marketing Agreement Act . . .").

Nor, as the City asserts (Pet. at 14), does the decision below threaten to have the "practical adverse effect" of

and *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310 (8th Cir. 1991), cert. denied, ____ U.S. ___, 60 U.S.L.W. 3359 (1991), the cities sought to compete with cable television operators to whom they had previously granted *non-exclusive* franchises. Those cases involved considerably different issues, not present here, concerning the First Amendment implications of government ownership and control of a cable television system, the equal protection considerations that arise when a franchising body decides to compete on admittedly unequal terms with a private franchisee that it regulates, and the like. Despite the fact that those issues have been raised in cases before a number of lower courts and have far broader applicability than this case to the operation of cable television systems by municipal governments, the Court denied certiorari in both cases.

²⁰ The City's references to the *Warner* case (Pet. at 9, 16), cited at note 19, *supra*, are thus inapposite. While that case may have confirmed on *some* grounds a municipality's right to compete with a private cable system, it did not address the situation where, as here, a city contractually agreed that it would not compete with its franchised operator.

making the few of cable systems that operate in rate-deregulated communities pursuant to exclusive franchises less responsive to community needs. For this ignores both marketplace realities and extant federal and local regulations. Congress' rationale for deregulating rates in certain communities was that there were adequate competitive pressures in the marketplace from alternative viewing services²¹ to make local governmental rate regulation in those communities unnecessary and undesirable. H.R. Rep. No. 934, *supra*, at 25, reprinted in 1984 U.S.C.C.A.N. at 4662. With the FCC's recent revision of the "effective competition" rules, the number of instances in which cable operators' rates are free of local governmental regulation are now far more limited than initially envisioned. Moreover, although the Cable Act has temporarily suspended local regulation of basic cable rates in some communities, it declared and reinforced cities' power to pervasively regulate other aspects of cable operators' businesses in areas such as facilities and equipment (47 U.S.C. § 544(b)), consumer protection and customer service (*id.*, § 552(a)(1)), construction schedules and standards (*id.*, § 552(a)(2)), and franchise renewal (*id.*, § 546). Thus, even during the period in which the City of Jamestown's power to regulate James' rates was suspended—which power has now been restored—the City retained ample other powers under Ordinance No. I, including the power of franchise revocation, to regulate James and ensure that James operated in the public interest. See pp. 2-3, *supra*.

In short, review of the decision below is no more necessary than it is appropriate. If the Court were to grant

²¹ See, e.g., *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351 (4th Cir. 1983), cert. denied, 465 U.S. 1027 (1984); *Cable Holdings of Georgia, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1563 (11th Cir. 1987) (cable systems compete in a product market comprised of, in addition to cable, other video entertainment services such as broadcast television, multipoint multichannel distribution systems ("MMDS"), direct broadcast satellite ("DBS") services, television receive only ("TVRO") services, VCR home movie rentals and movie theaters).

certiorari here, its ruling would be effectively limited to the facts of a very unusual, if not unique, case that is of little precedential or practical import.²² Whether exclusive franchises "continue to be valid" under the Cable Act is simply neither a "basic" nor an important question (see Pet. at 11) and does not warrant exercise of this Court's limited certiorari jurisdiction. See *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (particularly in the case of an asserted constitutional question, the Court's "special and important reasons" criterion for exercising certiorari jurisdiction requires that the issue, even if real, be "beyond the academic or the episodic" for the Court to consider hearing the case).

B. The City's Constitutional Claim Is Neither Properly Raised Nor Of Any Moment

Perhaps hoping to add luster to a case that otherwise does not warrant review, the City has sought at this late stage of the litigation to embellish its preemption claim with a First Amendment argument. The City asserts that the lower court's construction of Section 621 of the Cable Act has an unconstitutional result because it does not recognize an "important First Amendment dichotomy" between situations in which a natural monopoly exists (in which circumstances the City concedes that exclusive franchises are permissible) and those in which it does not. Pet. at 16-17. The City's strained, eleventh hour constitutional incantation should be rejected for several reasons.

First, this Court has made clear, since at least as early as *Crowell v. Randell*, 10 Pet. 368, 391-98 (1836), that it is essential to the Court's jurisdiction that a substantial federal question have been properly raised in the state

²² Compare, e.g., *Laing v. United States*, 423 U.S. 161, 167 (1976) (certiorari granted to resolve issue affecting seventy pending federal cases); *New York v. Ferber*, 458 U.S. 747, 749 n.2 (1982), and *New York v. O'Neill*, 359 U.S. 1, 3 (1959) (certiorari granted to review state statutes that had identical or substantially similar counterparts in 47 and 35 other states, respectively).

court proceedings. As the Court has stated, there are good policy reasons for this rule:

Questions not raised in the state court are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system, it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of [federal] constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground.

Cardinale v. Louisiana, 394 U.S. 437, 439 (1969); see also *Illinois v. Gates*, 462 U.S. 213, 218-20 (1983).

The First Amendment issue in this case was raised for the first time in the Petition for Writ of Certiorari. It was not mentioned, in any form or fashion, in any of the City's trial court or appellate papers or arguments. No record was developed below on this issue, and the lower courts were not afforded an opportunity to consider the question. Therefore, even if there were a substantial federal question raised in the Petition, the Court should decline to consider it because it was waived by the City's failure to raise it below. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967) (constitutional objections are waived by failure to raise them at the proper time); *White River Lumber Co. v. Arkansas ex rel. Applegate*, 279 U.S. 692, 700 (1929) (failure to raise federal question in state court cannot be cured by raising issue for first time in jurisdictional statement or petition for writ of certiorari).

Second, Section 621 of the Cable Act is a general law setting out franchising standards to be followed by local authorities. It does not deal with or target speech or protected expression. As the City's description of the supposed "dichotomy" illustrates, if the lower court's construction of Section 621 impacts First Amendment

rights at all, the impact is indirect and uncertain.²³ Moreover, the development and availability of numerous competitive television services other than cable (see notes 14 and 21, *supra*) ensure that, contrary to the City's claim (Pet. at 17-18), even communities such as Jamestown that are served by a single cable operator under an exclusive franchise will continue to receive a diversity of viewpoints from numerous alternative sources.²⁴ Thus, the lower court's construction of the Cable Act neither is inconsistent with, nor implicates, the First Amendment.²⁵

Third, even if the "First Amendment dichotomy" postulated by the City were real, and even if it could be shown that Jamestown is not a community in which a natural monopoly would develop, that issue is not appropriately before the Court because there is no person who can legitimately complain of any burden to his First Amendment rights. The City is not itself such a person because, to the extent *arguendo* that it had any right as a potential First Amendment speaker, it contractually waived that right when it granted an exclusive franchise.²⁶

²³ The City's claim that exclusive franchises *are* allowable under the First Amendment and Section 621 where there is a natural monopoly (Pet. at 16-17) betrays how indirect and difficult to define any such impact really is. The City does not provide even a hint as to how a court should determine when a natural monopoly exists.

²⁴ The City's reference to *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969), and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), is inapt, since the Court's holdings in those cases were premised on the limited spectrum space that characterizes the broadcast medium, a factor not applicable to cable television.

²⁵ It is well established that neutral laws of general applicability that are not targeted at expressive conduct do not raise First Amendment concerns even if they have some tangential effect, or impose some incidental burden, on First Amendment rights. See, e.g., *Barnes v. Glen Theatre, Inc.*, ___ U.S. ___, 111 S.Ct. 2456, 2465-67 (1991) (Scalia, J., concurring); *Leathers v. Medlock*, ___ U.S. ___, 111 S.Ct. 1438 (1991); *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990).

²⁶ The Constitution allows a First Amendment speaker to restrict his First Amendment rights by contract and by operation of general laws, such as the Tennessee law of contracts, which allow for the enforcement

Moreover, having bargained for an exclusive franchise and induced James' reliance thereon, the City is estopped from now repudiating that bargain, even on the ground that compliance is inconsistent with its First Amendment rights.²⁷

Finally, even if *arguendo* a third party applicant for a franchise might have standing to challenge James' exclusive franchise as an alleged impairment to its asserted First Amendment rights, see *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) (third party challenge to denial of franchise), this case unlike others (see Pet. at 16) does not present that question; for here the record is devoid of any reference to such a third party applicant, and in fact no third party has sought or been denied a franchise. The First Amendment burden therefore is entirely hypothetical and the Court should decline to rule upon it.²⁸

of such promises. See *Cohen v. Cowles Media Co.*, ____ U.S. ____, 111 S.Ct. 2513, 2518-19 (1991) (newspapers that breached their promise not to publish confidential information held liable for damages notwithstanding their claim that the First Amendment barred enforcement of their promises; the restrictions at issue were self-imposed, and any inhibition of First Amendment rights as a result of enforcement of the promises "is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them.").

²⁷ *Id.*; see also, e.g., *City of Mt. Vernon v. Berry*, 73 N.E. 515, 518-19 (Ohio 1905) (where city had entered a contract under the terms of an unconstitutional statute and performance had begun, city was estopped from repudiating contract); *Grosserand v. City of Gretna*, 121 So. 208, 211-12 (La. 1928).

²⁸ The Court has stated that it is not "authorized to answer academic questions. The constitutionality of a statute is not drawn in question except in connection with its application to some person, natural or artificial." *White v. Johnson*, 282 U.S. 367, 373 (1931); see also *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 70-81 (1961) (the Court will not grant review of constitutional issues that are prematurely raised or grow out of the mere potential impairment of asserted rights under a statute).

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C. The City Has Failed To Show That The Decision Below Is In Conflict With The Decisions Of Another State Court Of Last Resort, A Federal Court Of Appeals Or This Court

Review by this Court is not necessary to secure uniformity of decision among the lower courts. Apart from the decision below, the City cites no other case where the federal question raised here has been presented, let alone decided, and certainly no evidence of any direct or material conflict on that issue between the decision below and the decisions of state or federal courts. Nor, save for its attenuated and incurably late First Amendment argument, does the City assert any conflict between the decision below and the decisions of this Court. Under circumstances such as these, the Court has declined to exercise its certiorari jurisdiction. *See, e.g., Lane & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-93 (1923); *Sanchez v. Borras*, 283 U.S. 798 (1931).

CONCLUSION

Because this case fails to satisfy the requirements of 28 U.S.C. § 1257(a), the Court lacks jurisdiction over the case. Moreover, the City has failed to demonstrate that there are special and important reasons that warrant review of the decision of the court below. Given the factually unique nature of the case, the limited practical and precedential importance of the issues presented, the correctness of the court of appeals' decision, and the absence of any conflict between the lower court's judgment and the decisions of this or any other court, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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